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Supreme Court of the United States

OCTOBER TERM, 1958

No. 91

RAY CASH, PETITIONER

vs.

R. O. CULVER, STATE PRISON CUSTODIAN

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petition for Certiorari
Filed January 11, 1958
Certiorari granted June 9, 1958

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INDEX

	Original	Print
Proceedings in the Supreme Court of the State of Florida		
Petition for writ of habeas corpus	1	1
Order denying petition for writ of habeas corpus	18	20
Clerk's certificate (omitted in printing)	19	20
Order granting motion for leave to proceed in forma pauperis and granting petition for writ of certiorari	20	21

1 IN THE FLORIDA SUPREME COURT

AT TALLAHASSEE, FLORIDA

RAY CASH, *Petitioner*

v.

R. O. CULVER, as State Prison Custodian, *Respondent*

Petition for Writ of Habeas Corpus

Comes now the petitioner, Ray Cash, in his own proper person without counsel, and respectfully represents unto the court as follows:

That he is a pauper, totally unable to pay costs or fees in connection with this application, and therefore prays the Court for leave to proceed in forma pauperis.

That he is and has been restrained and detained of his liberty without authority of law and he presents this petition under and by virtue of section 451 Title 28 U.S.C.A.

That petitioner is imprisoned and detained upon a judgment of conviction found against him without due process of law and entered against him without regard to his Federal rights under the 14th Amendment to the Constitution of the United States, specifically as follows:

-1- The trial court deprived him of his rights to retain counsel for his defense.

-2- The trial court deprived him of his rights to representation by counsel.

-3- The trial court deprived him of a fair and impartial trial.

-4- The trial court deprived him of Due Process of law.

-5- The trial court deprived him of his Constitutional rights under both State and Federal Constitutions.

2 HISTORY OF THE CASE

Petitioner shows he was informed against by the Honorable Ted Duncan, States Attorney for the Eighth Judicial

Circuit of Florida, and was tried on an information charging Breaking and Entering with intent to commit a felony, before Honorable George L. Patton, in the Circuit Court in and for Alachua County, Gainesville, Florida, on December 6, 1954, the trial resulted in a hung jury and immediately thereafter petitioner was removed from the Alachua County jail and taken to the Florida State Prison and placed in solitary confinement in what is known as the Flat Top, and remained in solitary confinement in the State Prison at Raiford, Florida, until February 20, 1955. On February 20, 1955, petitioner was removed from the State Prison back to the County jail in Alachua County, Florida, the next morning, February 21, 1955, petitioner was taken to Court and informed he was to stand trial again on the information for breaking and entering of which the jury could not agree on a verdict.

Petitioner informed Honorable George L. Patton that he had been informed on Thursday February 17, 1955, by one of the Prison Officials at Raiford, Florida, that his attorney Honorable Henry Carr, of Miami, Florida, had withdrawn as his attorney, and ask the Court if Mr. Carr had filed a motion to withdraw as his attorney. Judge Patton informed petitioner he had granted Mr. Carr's motion to withdraw as defense counsel.

Thereupon, petitioner filed a motion for a continuance on the ground that he needed time to enable him to employ new counsel. And that petitioner had not been advised by his chosen counsel Mr. Carr, or the court that trial was to be on February 21, 1955.

The States Attorney, Honorable Ted Duncan, objected to granting the motion and stated, Quote, "Cash was advised a week ago that Carr intended to withdraw."

"Duncan said he talked with Cash's Mother last week and she told him she was going to get a lawyer that day."

"Mrs. Cash, a graying heavy set woman, told the Sun today she was unable to get an Attorney because none would accept the case for the amount of money she was able to offer them. She said she spoke to a number of lawyers but they all refused because of the

fee and also on the grounds that there was too little time to prepare a defense."

The above quote was taken from the Gainesville Sun

The petitioner shows Judge Patton denied his motion for continuance on the grounds the State had gone to great expense to bring witnesses to testify and therefore petitioner would have to stand trial that day.

Petitioner explained to the Court that he was not capable of representing himself, that he was only 20 years of age and was uneducated and had never heard a court trial except the one time he was tried on the same charge, and then he was represented by Mr. Carr, and that he did not know court procedure or how to conduct his defense, and told the court he had been closely confined in solitary at the Florida State Prison at Raiford, up until the night before, and therefore he had no opportunity to employ new counsel, since the Court had permitted his chosen counsel to abandon him in the face of trial, and it was an absolute necessity that the court grant a continuance, or, in the alternative, for the court to remedy the situation by appointing counsel to represent the petitioner.

The request for continuance and counsel was refused, and thereupon the court ordered the trial to proceed immediately without any defense counsel.

Petitioner was found guilty by jury and Judge Patton, sentenced petitioner to 15 years in Prison. Petitioner's codefendant, Lawrence Allen entered a plea of guilty and testified for the State.

It should be noted that all of the evidence introduced by the State was taken from the car and house trailer of the co-defendant Allen. Allen was arrested in California by the F.B.I. and he was driving a new Cadillac and was living in a new $8,000 dollar house trailer, and when arrested he had $24,000 dollars cash on him and thousands of dollars worth of jewels. Allen is a well known hijacker and safe cracker with a long police record, and an ex-convict. He is also several years older that the petitioner. Petitioner was arrested in Georgia and

had no money, and there was nothing that would connect Allen and the petitioner except Allen's word. Mr. Duncan did not order the hardened criminal Allen taken to the Florida State Prison and locked up in solitary confinement, instead he was given the run of the County Jail and a sentence of 10 years probation was imposed on Allen by Judge Patton, and the petitioner who was a first offender was sentenced to 15 years in the State Prison.

Thus ends the history of the case.

Argument and Question # 1

Under the Due Process Clause of the 14th Amendment to the Constitution of the United States, a Defendant in a State Prosecution Has Been Held to be Entitled to Retain Counsel as a Matter of Right. Is that Right Abused When His Chosen Counsel Withdraws From the Case at the Commencement of His Trial, and He is Immediately Thereafter Put to Trial Over His Objections and Without Counsel? Is that Right Abused by the Refusal of the Trial Court to Grant Continuance When Request for Same is Based Upon Defendant's Need for Additional Time Within Which to Employ New Counsel?

This question does not involve the question of court-appointed counsel. It involves primarily, the right of a defendant in the State of Florida, under both his federal and State constitutional rights to Due Process, to retain and employ counsel and to be represented by counsel of his own choice. The petitioner contends that after his plea of not guilty, after his counsel abandoned him, the trial courts refusal to grant him a continuance for the purpose of enabling him to seek new counsel, operated to deprive him of his constitutional right to representation by counsel, and also operated to deprive him of a fair and impartial trial.

Petitioner's right to so avail himself is the meat of the case here. That right was abridged and abused by the refusal of the trial court to allow continuance so that

petitioner could arm himself with the most important of all judicial weapons, a professional scholar of the law to plead his cause, and to establish his innocence.

Petitioner relies on an opinion handed down by the Florida Supreme Court in the case of *Wood* v. *State of Florida,* 19 So. 2nd, pages 872-876, wherein the following rule was enunciated:

> "We are committed to the Doctrine that regardless of the heinousness of the crime one may be charged with, he is entitled to a fair and impartial trial . . . and . . . a fair and impartial trial contemplates *counsel,* compulsory attendance of witnesses, and *time in which to prepare for trial* . . . and . . . steps short of these several requirements defeat the spirit of the law . . . ." (See also words and phrases, permanent edition, for other definitions of fair trial; also, *Christie* v. *State,* 94 Fla., 469; 114 So. 450)

Petitioner relies on decisions of the United States Supreme Court which specifically apply and control the instant situation. The following language is quoted from *Betts* v. *Brady,* 316 U.S. 463; 62 Sup. Ct. 1257; and also *Powell* v. *Alabama,* 287 U.S. 45; 53 Sup. Ct. 55-65; 77 L. Ed. 158; 84 A.L.R. 527;

> "In the fundamental law of most states, the language used indicates only that a defendant is *not to be denied the privilege of representation by counsel of his choice.*" (*Betts* v. *Brady, supra*)
>
> "The failure of the trial court to afford the defendants *reasonable time and opportunity to secure counsel was* a clear denial of due process." (*Betts-Brady,* supra)
>
> "It is hardly necessary to say that the right to counsel being conceded, a defendant should be afforded a fair opportunity to secure counsel of his own choice." (*Powell* v. *Alabama,* supra)

The Florida Supreme Court in the case of *House* v. *State,* 130 Fla. 400; 177 So. 705; made the observation that:

". . . when construing the constitution of the United States, it is the duty of this court to follow the Constitution placed thereon by the Supreme Court of the United States . . ."

In the *Powell* v. *Alabama* case, supra, the United States Supreme Court detailed at length the question here involved:

"What, then, does a hearing include? Historically and in practice in our own country at least, *it has always included the right to the aid of counsel when desired and provided by the party asserting the right.* The right to be heard would be, in many cases of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, *and convicted upon incompetent evidence, or evidence irrelevant to the issues or* 6 *otherwise* inadmissable. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. He requires the guiding hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect. It in any case Civil or criminal, a state or federal court were arbitrarily to refuse to hear a party by counsel, employed by and appearing for him it reasonably may not be doubted that such a refusal would be a denial of a hearing, and, therefore, of due process in the constitutional sense."

Further on in the same opinion, the U.S. Supreme Court continues:

"In ex parte Riggins (C.C.) 134 Fed. 404, 418, a case involving the Due Process clause of the 14th Amendment, the court said, by way of illustration, that if the state should deprive a person of the benefit

of counsel, it would not be due process of law. Judge Cooley refers to the right of a person accused of crime to have counsel as perhaps his most important privilege, and after discussing the development of the English Law on that subject, says: "With us it is a universal principle of constitutional law, that the prisoner shall be allowed a defense by counsel." (I Cooley, Const. Lim. 8th Ed. 7 C.) The same author, as appears from a chapter which he added to his edition of Story on the Constitution, regarded the right of the accused to the presence, advice and assistance of counsel as fundamental in character. *E. G. People* v. *Napthaly,* 105 Cal. 641, 644, 39 Pac. 29; *Cutts* v. *State of Florida,* 54 Fla. 21, 23, 45 So. 491; *Martin* v. *State,* 51 Ga. 567, 568, 1 Am. Crim. Rep. 536; *Sheppard* v. *State,* 165 Ga. 460, 464, 141 S.E. 196; *State* v. *Moore,* 61 Kan. 732, 734, 60 Pac. 748; *State* v. *Ferris,* 16 La. Ann. 424.

In *Messer* v. *State,* 120 Fla. 95; 162 So. 146, the Florida Supreme Court said:

> "The constitutional right of an accused to be 'heard' by counsel is stated in language of emphasis that means just what it says. *It should be respected in substance as well as in form by the trial courts.* The United States Supreme Court in *Powell* v. *State of Alabama* (supra) has gone so far as to hold that the constitutional right to be heard by counsel is an indispensable part of due process of law itself as required by federal law under the 14th amendment. The right to be heard by counsel being a constitutional one, it follows that no intentional, nor unintentional, frittering away of the constitutional privilege in this regard should be tolerated . . ."

Some further consideration of this right is found in the case of *House* v. *State,* 130 Fla. 400, 177 So. 705, wherein the Florida Supreme Court said:

> "The Supreme Court of the United States has held that *the right of one charged with crime to be represented by counsel includes a fair opportunity to secure counsel of his own choice, and that he is as much entitled to the assistance of counsel in prepar-*

ing his trial as at the trial itself and that a denial of these rights is contrary to the due process clause of the 14th amendment to the Federal Constitution."

Insofar as the instant case of Petitioner Cash is concerned, the practical and mandatory application of these rules is found to squarely fit the circumstances about which he complains, if only by virtue of the following federal rule as to this State (Fla.) as found in the decision of *House* v. *Mayo,* 63 Fed. Supp. 169:

> "In Florida it is held that the right of the accused in all criminal cases to be heard by himself, or counsel or both, as guaranteed by Section 11 of the Declaration of Rights of the Florida Constitution, is more than a mere right of the accused. It is a mandatory organic rule of procedure in all criminal prosecutions, and a requisite of a fair and impartial trial in that state. *Deeb* v. *State,* 131 Fla. 362, 179 So. 894; *Christie* v. *State,* 94 Fla. 469, 114 So. 450. This being the nature of the right conferred by the Florida Constitution, denial of such an organic right constituted a denial of due process guaranteed by the Fourteenth Amendment which may be redressed, in appropriate circumstances in a federal court by habeas corpus. *Ex parte Hawk,* 321 U.S. 114, 64 Sup. Ct. 448, 88 L. Ed. 572, Cf. *Williams* v. *Kaiser,* 323 U.S. 471, 65 Sup. Ct. 363, 89 L. Ed.; *Tomkins* v. *Missouri,* 323 U.S. 485, 65 Sup. Ct. 370; *House v. State,* 130 Fla. 400, 177 So. 705."

The Federal and State decisions are abundant with instances wherein it is consistently held that one, in the circumstances of petitioner's situation, was entitled to counsel as a matter of right and was entitled to reasonable time within which to avail himself of that right when his chosen counsel elected to abandon him in the face of trial. Judicial precedents which support the view of petitioner could be cited ad infinitum. It seems futile and unnecessary to burden this court further with citations of the rule so firmly established in the Federal Courts and the Florida Courts. In a long line of cases here cited, the United States Supreme Court held that:

8 "It is a denial of the accused's right under the due process clause of the 14th Federal Constitutional amendment to *force him to trial with such expedition as to deprive him of the effective aid and assistance* of counsel."

See *Williams* v. *Kaiser*, supra.
Tomkins v. *Missouri*, supra.
Rice v. *Olson*, supra.
Betts v. *Brady*, supra.
Powell v. *Aalabama*, supra.
Ex Parte Hawk, supra.
House v. *Mayo*, supra
Avery v. *Alabama*, 308 U.S. 444, 84 L. Ed. 377, 60 Sup. Ct. 321.

Petitioner's application for continuance became a virtual legal necessity for the following four reasons:

1. Due Process of law required it and Florida Statute (909.20) required it to enable preparation of defense *after the entry of not guilty plea.*
2. Due Process required it and Florida Statute (916.03) required it because the ground for such request (abandonment by counsel). *arose after the cause was set for trial.* The universally accepted standards of fairness and right dictate that continuance should be granted to any defendant wherever abandoned by his counsel.
3. Due Process required it and the Florida Bill of Rights required it because therein are found respectively the federal and state rights to be represented by counsel. The Florida Bill of Rights entitles a defendant in a state court criminal prosecution to representation by himself *by counsel,* or by both.
4. The Due Process clause of the 14th amendment to the U.S. Constitution required it, because all the court's of last resort and the United States Supreme court have consistently agreed that in all state court prosecutions a defendant is legally entitled to avail himself of his right to representation by counsel of his choice.

Cash's counsel abandoned him in the face of trial, leaving him naked, unprotected, unprepared, and "undefended". Petitioner contends that such abandonment was grounds for continuance and that such grounds arose after the case was set for trial. His predicament fits to perfection the pattern of circumstances contemplated by the Florida law, Section 916.03.

Failure of the trial court to invoke the State Statute in these circumstances was a failure to invoke due process. Fairness and Right demanded that a continuance be granted in these circumstances.

It hardly seems necessary to burden this court with further argument on this question.

9 Under the Due Process clause of the 14th amendment to the Constitution of the United States, and the opinions handed down by the United States Supreme Court, and the opinions handed down by the Florida Supreme Court, is a defendant entitled to court appointed counsel when it is shown the defendant is unable to employ counsel, and is incapable of representing himself adequately at the trial on account of age, inexperience and ignorance of court procedure and lack of mental capacity to prepare and present his defense to establish his innocence?

Petitioner shows in the history of this case that he did not know his chosen counsel had withdrawn as his attorney until Feb. 17, 1955, and petitioner was closely confined in solitary at the Florida State Prison at Raiford, Florida, therefore, it was impossible for petitioner to make arrangements for new counsel while so confined. There are a lot of questions that should be answered in this case, as to why the petitioner was sent to the State Prison for safe keeping when he had never escaped in his life from any one, and the co-defendant with a long police record was confined in the county jail, and why did Mr. Henry Carr, withdraw from the case? and why did Judge Patton refuse to grant continuance or appoint counsel? and why did the Hon. Ted Duncan fail to file charges against John Fulford and Fred Cash, in this case when Lawrence Allen,

the big time gangster named them as being with him when he robbed the store.

Every one who knows anything about what was known as the "Cash" gang, knows that Ray Cash, was not a member of that gang and that his older brother Virgil and Fred Cash would never let their baby brother hang around with them much less take part in their criminal activities. This gang was known as big time operators as the testimony of one of its old members, Lawrence Allen shows he and the other members pulled a $180,000 robbery in New Orleans, and the petitioner, Ray Cash, was not there.

The record will show Mr. Henry Carr had represented the States star witness and big time gangster six times in Miami alone for hi-jacking and succeeded in gaining his release. In this case Mr. Carr was representing the petitioner for a very small fee. Could Mr. Carr have entered a pact with his former wealthy client, Allen, and the States Attorney Mr. Duncan to withdraw from petitioner's case at the last moment, therefore rendering the petitioner helpless at the trial and setting the stage whereby Mr. Duncan could shift the evidence from in possession of the witness Allen, to this ignorant backwoods country youth. It should be noted that all the evidence was in possession of the witness Allen, therefore, it was an open and shut case against him and he had to pull some strings or go to prison.

The question is did this theory materialize?

The facts in the case say yes, Mr. Carr withdrew as Attorney for the petitioner just before trial leaving the petitioner helpless and alone, the court would not grant continuance, and would not appoint counsel. Next we find the Honorable Ted Duncan performing a duel role of defending the big time gangster Lawrence Allen, and taking the evidence from in possession of Allen, and putting it in possession of the youth Ray Cash. Mr. Duncan realized he could not do this if the petitioner was defended by counsel as he had failed to convict the petitioner before when he was represented by counsel.

Next we find the trial under way with the Veteran States Attorney, Honorable Ted Duncan, and his able assistant, Hon. Joe Hill Williams, prosecuting for the state, and we find a 20 year old farm boy trying to defend himself. Even under this setting without interference from the defense, Mr. Duncan was having trouble accomplishing his dual role.

Petitioner quotes from the Gainesville Sun.

> "State Attorney Ted Duncan today began the laborous process of corroborating testimony that Ray Cash participated in a burglary here last year."
> "Yesterday, Lawrence Allen, a friend of Cash's for over four years took the stand for an hour and a half and related how he and Cash in company of two others, burglarized stores, stole a truck and became engaged in a running gun battle with police. Duncan said today he would call most of the State witnesses to corroborate Allen's account of the crime."
> "Cash, unable to obtain counsel for lack of time and
11 money, is conducting his own defense. No provision is made under Florida law for an appointed defense attorney except in capital cases."
> "Cash is expected to run into some tough legal knots during the course of the trial, as over 20 items of evidence linking him to the burglary were placed into evidence during the last trial."

From the newspaper report of the trial it is obvious the petitioner Ray Cash was incapable of conducting his defense, and was unfamiliar with the rules of evidence. And it was a burden on the court in the circumstances of this case to protect the petitioner's constitutional rights by appointing counsel to see that justice was done.

This Honorable Court in *Sneed* v. *Mayo*, 66 SO. 2d, 865, said:

> . . . "Not because the evidence adduced at the trial on the criminal charge was insufficient to establish guilt, but because, under the Federal decisions, the judgment of conviction is void for failure of the trial court to afford to the defendant the safeguards guaranteed under the Federal Constitution. *Betts* v.

Brady and *Wade* v. *Mayo*, supra; *Ureges* v. *Com. of Penn.*, 335 U. 5 437.69 S. Ct. 184, 93 L. Ed. 127 . . . ."

In *Sneed* v. *Mayo*, the petitioner Sneed was 21 years old. In this case the petitioner Cash was 20 years old. It was shown Sneed was uneducated and unfamiliar with legal matters or procedure and was incapable of representing himself. In the case at bar it will be seen by the record, the petitioner Cash, is uneducated and unfamiliar with legal matters or procedures and was incapable of representing himself adequately.

We find the predicament of Sneed and petitioner Cash, to be identical insofar as the need of counsel to represent them. The same conclusions must be reached in the case at bar as in the *Sneed* case, and this Honorable Court said in the *Sneed* case:

> "From the above cited cases, and the State and Federal decisions and Statutes cited therein, certain principles seem clearly established."
>
> "The court has no right to deprive the accused of the benefit of counsel in a criminal proceeding."

This Honorable Court has cited *Wade* v. *Mayo*, 334 U.S. 672, 68 S. Ct. 1270, 1275, 92 L. Ed. 1647, on
12 numerous occasions it was shown in the *Wade* case, he was a youth of 18 years of age and the trial court would not appoint counsel to represent him and that was the only question in the *Wade* case, and the United States Supreme Court ruled the trial court violated due process of law and the constitutional rights of Wade in refusing to appoint counsel.

The facts in *Wade* v. *Mayo* in regards to counsel are identical twins. The practical and mandatory application of the rules handed down by the United States Supreme Court in that case must be applied in the instant case of petitioner Cash.

In *Sneed* v. *Mayo*, this Honorable Court said:

> "It has been the general practice in trial courts in this State, when a person charged with felony has

been brought to the bar for arraignment, to inquire of the accused whether he had counsel to represent him, and if, upon inquery, it developed that he had no attorney and was unable to employ one, to ask the accused if he desired one to represent him. If he signified his desire to be represented by counsel, that it has been the practice for the trial judge to appoint some attorney to represent the accused. This practice is in accord with the letter and spirit of the Bill of Rights, and section 3969 of the General Statutes of 1906—now section 909.21 Florida Statutes 1951 F.S.A. . . . While the practice in this State has been as indicated above, still there is no law requiring it *Unless the accused is incapable of representing himself adequately at the trial on account of age,* ignorance or lack of mental capacity."

In this same opinion the Florida Supreme Court says: Compare *Betts* v. *Brady,* 316 U.S. 455, 62 S. Ct. 1252, 86 L. Ed. 1595, and also *Wade* v. *Mayo,* those two opinions by the United States Supreme Court says the judgment in the case at bar can not stand because of the age of petitioner and his inability to adequately represent himself as shown by the record.

Petitioner quotes from the Gainesville Sun:

"Duncan then introduced a .38 revolver into evidence as being the one missing from Linzmayer's store."
"Cash objected to introduction of the weapon and the box in which it was kept, but was unable to state a valid ground for the objection."

It should be noted the gun that was introduced as evidence against the petitioner Cash, was the gun the F.B.I. Officer D. E. Raney taken off of the big time gangster, and the States star witness, Lawrence Allen, in the State of California.

13 Therefore the gun had no place in the trial of the petitioner Cash, but Cash lacked the knowledge of how to show it was inadmissable.

Still quoting from the Gainesville Sun:

"While making objections and inquiring of the Judge and witnesses, Cash appeared unsure of himself. On

several occasions he would start a sentence, then stop to rephrase it or start on another subject. Before making objections Cash raised his hand to attract the attention of the Judge, then in a halting manner would make his statement."

Under these circumstances can this Honorable Court hold that this youth was capable of defending himself. In *Powell* v. *Alabama,* supra, the United States Supreme Court must have had in mind such a case as the petitioner's. As that opinion covers the facts in this case. And it will be found in *Betts* v. *Brady* the Supreme Court of the United States quoted in that opinion.

. . . "Would it not be a little like mockery to secure to a pauper these solemn constitutional guarantees for a fair and full trial of the matters with which he was charged, and yet say to him when on trial that he must employ his own counsel, who could alone render these guarantees of any real permanent value to him. Why this great solicitude to secure him a fair trial if he cannot have the benefit of counsel?

. . . "Denial to the poor of the request for counsel in proceedings based on charges of serious crime has long been regarded as shocking to the Universal sense of justice" Throughout this country . . . for example, the Supreme Court of Indiana said: It is not to be thought of, in a civilized community, for a moment that any citizen put in jeopardy of life or liberty should be debarred of counsel because he was too poor to employ such aid. No court could be respected, or respect itself to sit and hear such a trial. The defence of the poor, in such cases, is a duty resting somewhere which will be a once conceeded as assential to the accused to the court, and to the public. *Webb* v. *Baird,* 6 Ind. 13, 18, and most of the states have shown their agreement by constitutional provisions, statutes or established practice judicially approved which assure that no man shall be deprived of counsel merely because of his poverty. Any other practice seems to me to defeat the promise of our democratic society to provide equal justice under the law."

The above view taken by the United States Supreme Court, and also in *Wade* v. *Mayo*, says such a trial as the petitioner had is as no trial.

14 Because the Florida Supreme Court has consistently held the trial courts of Florida must appoint counsel for indigent defendants, when requested and it is shown the defendant is not capable of representing himself, and has consistently held the trial court must inquire if the accused is represented by counsel, if not it has been the practice to appoint some attorney to represent the accused. See:

Hack v. *State*, 141 Wisc. 346, quoted by Justice Buford, J., in *Zellers* v. *State*, 189 So. 236, 138 Fla. 158, 1939.

What is the meaning of the equal protection clause? It may be said generally that the equal protection clause means that the rights of all persons must rest upon the same rule under similar circumstances, so that all persons similarly circumstanced shall be treated alike.

How do the courts consider the due process of law provision? A statute which undertakes to deprive a person of his liberty without notice and opportunity to be heard by counsel certainly is invalid. The courts have held that the due process of law provision is the most important guaranty of personal rights to be found in the Federal or State constitutions. It is a limitation upon arbitrary power, and is a guaranty against arbitrary legislation. No citizen shall arbitrary be deprived of his life, liberty or property. This the legislation cannot do nor authorize to be done. The United States Supreme Court has repeatedly declared that due process guaranteed by the Federal constitution requires a trial in a State Court, conforming to the fundamental concepts of justice which lie at the base of our civil and political institutions, and that if the state supplies no corrective process the Federal Courts will intervene to protect the life or liberty of the citizen from a judgment where the trial is not conducted according to such standard.

It will be seen by the authoritys cited in this petition, that it is the practice in Florida to appoint counsel to indigent defendants. Did the petitioner in this cause receive the same equal protection of the law as other defendants has received in the Florida Courts under the same circumstances?

15 Can it be said that the petitioner received a *Fair* and *Impartial* trial as required under both Federal and State constitutions, and the trial was conducted according to standards laid down by those constitutions?

When the light is thrown on the true facts of this case, it brings out questions that require and demand answers. Such as the sentences imposed by Judge Patton, he sentenced the petitioner a youth of 20 years of age and a first offender to 15 years in the Florida State Prison at hard labor, and he sentenced the co-defendant a big shot and wealthy big time gangster, and also an ex-convict to 10 years to be probated. Now if these sentences were reversed it would sound right, and would be appropriate. There can be only two answers as to why such sentences was imposed there had to be a pay off to Judge Patton, or to some one who had influence over Judge Patton, or Judge Patton put a penalty on the petitioner for exercising his constitutional rights and demanding a jury trial.

The states witness Allen, the big time gangster, testified at the trial that he "Allen" had staged a $180,000 dollar robbery a short time before his arrest. The question is what influence did this money have on the outcome of this trial "If it could be called a trial," and the sentence imposed.

The United States Supreme Court said in *Griffin* v. *Illinois* in Certiorari No. 95, Oct. Term 1955, April 23, 1956.

> . . . "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. . . ."

Petitioner quotes from the Gainesville Sun.

> "Allen testified that Cash was with him, Fred Cash, and John Fulford the night of April 3, and that all

four took part in the theft . . . Allen said Fulford was driving his 1950 Oldsmobile. Fred Cash was with him, Ray Cash was with me in my 1952 Dodge."

Here is another odd question in this case Mr. Duncan did not even file charges against these big shots John Fulford and Fred Cash, why? was it because he knew they would come to trial with competent attorneys and he would not have a chance to convict as there was no evidence except what had been manufactured against Ray Cash, so Mr. Duncan could make it look legal and justifiable in releasing the wealthy gangster Lawrence Allen? or did these big shots Fred Cash and John Fulford pay off to keep from being charged with this crime?

It has been shown the petitioner was placed in solitary confinement and held there until the night before his trial. Why? Justice Black writing for the Supreme Court of the United States in *Chambers* v. *Florida*, 309 U.S. 227, said:

> "From the popular hated and abhorrence of illegal confinement, torture and extortion of confessions of violations of the "law of the land" evolved the fundamental idea that no mans life, liberty or property be forfeited as criminal punishment for violation of that law until there had been a charge fairly made and fairly tried in a public tribunal free from prejudice, passion, excitement and tyrannical power . . . wrote into its basic law the requirement, among others, that the forfeiture of lives, liberties or property of people accused of crime can only follow if procedural safeguards of due process have been obeyed . . . the rack, the thumb screw, the wheel, solitary confinement . . . and other ingenious forms of entrapment of the helpless or unpopular . . . and they who have suffered most from secret and dictatorial proceedings have almost always been the poor, the ignorant, the numerically weak, the friendless and the powerless."

It has become well settled throughout all jurisdictions of this country: in all our state courts of last resort: and in the United States Supreme Court, that convictions for

alleged criminal offenses, when they have been arrived at via detours from the legitimate highway of constitutional construction; when their foundation is laid in judicial procedures which lacked the essential rudiments of American Justice—Fairness and Right; they are without the validity necessary to lawful enforcement; they are convictions found in violation of Due Process of Law and as such are contrary to and in violation of the 14th amendment to the United States constitution. Such convictions have been universally held to be not merely voidable, but are V O I D from the inception.

The authoritys cited under question one are applicable also to question No. Two, and from the authoritys cited and the facts in this case warrants the serious consideration of this Honorable Court.

Wherefore, petitioner respectfully prays unto this Honorable Court that the gracious States writ of Habeas Corpus issue forthwith according to law, directed to the respondent named in this cause, to the end, that the matters herein complained about be inquired into and that relief appropriate to the circumstances be granted that pursuant thereto, petitioner be discharged from unlawful custody.

17

Petitioner shall ever so pray

/s/ Ray Cash
Ray Cash
Petitioner

COUNTY OF UNION
STATE OF FLORIDA

Subscribed and sworn to before me this 25th day of November, 1957.

/s/ LAWRENCE E. DUGGER
Notary Public

Notary Public, State of Florida at large.

My commission expires Sept. 19, 1958.

Bonded by American Surety Co. of N. Y.

Duly sworn to by Ray Cash
jurat omitted in printing

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18 IN THE SUPREME COURT OF FLORIDA

RAY CASH, *Petitioner*

VS.

R. O. CULVER, as State Prison Custodian, *Respondent.*

Order Denying Petition for Writ of Habeas Corpus
Dec. 10, 1957

The above named petitioner has filed a petition for Writ of Habeas Corpus, and upon consideration thereof, it is ordered that said petition be and the same is hereby denied.

---

19 Clerk's Certificate to foregoing transcript omitted in printing

No. 474 Misc., October Term, 1957

RAY CASH, *Petitioner,*

vs.

R. O. CULVER, State Prison Custodian

ON PETITION FOR WRIT OF CERTIORARI to the Supreme Court of the State of Florida.

Order granting Motion for Leave to Proceed in Forma Pauperis and Granting Petition for Writ of Certiorari—June 9, 1958

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby granted. The case is transferred to the appellate docket as No. 1057.

June 9, 1958.

☆ U. S. GOVERNMENT PRINTING OFFICE 1958—485478/P.O. 548

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 91

RAY CASH,

Petitioner,

vs.

R. O. CULVER, State Prison Custodian,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR THE PETITIONER

Opinions Below

The Supreme Court of Florida did not file an opinion. Its "Order Denying Petition for Writ of Habeas Corpus" (R. 21) is not reported.

Jurisdiction

The jurisdiction of this Court rests on 28 U.S.C. §1257(3), in that the petition denied by the order below (R. 21) alleged imprisonment in violation of the Fourteenth Amendment through deprivation of the right to counsel (R. 1).

Constitutional and Statutory Provisions Involved

The due process clause of the Fourteenth Amendment, together with the several provisions of Florida law touched on in our Argument, are set out in the Appendix.

UPREME COURT. U. S.

JAMES R. BROWNING, Clerk

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 91

RAY CASH,

Petitioner,

vs.

. CULVER, State Prison Custodian,

Respondent.

CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR THE PETITIONER

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SUBJECT INDEX

	Page
BRIEF FOR THE PETITIONER	
Opinions Below	1
Jurisdiction	1
Constitutional and Statutory Provisions Involved	1
Questions Presented	2
Statement	3
Summary of Argument	6
ARGUMENT	8
I. Under the Circumstances of the Trial, the Denial of Petitioner's Motion for Assignment of Counsel Deprived Him of Due Process of Law	8
A—Accomplice Testimony and Its Corroboration	11
B—Testimony Concerning Petitioner's Participation in Other Crime	15
C—Guilt by Association: Testimony Concerning Crime Committed by Petitioner's Brothers But Not by Petitioner	18
D—Retrial After Hung Jury	22
II. Quite Apart From the Circumstances of the Trial, the Denial of Petitioner's Alternative Motion for Continuance to Engage Counsel Deprived Him of His Specific Constitutional Right to Paid Counsel of His Own Choice	23
III. The Incorporation of a Newspaper Account of the Trial Into the Sworn Petition for Habeas Corpus Constitutes an Adequate Allegation of the Trial Events Recited in the Account	27
CONCLUSION	31
APPENDIX	33

CITATIONS:

CASES:

	Page
Acree v. *State*, 153 Fla. 561, 15 So. 2d 262 (1943)	24
Alford v. *State*, 47 Fla. 1, 36 So. 436	23
Bacon v. *State*, 22 Fla. 52 (1886)	11
Bass v. *State*, 121 Fla. 208, 163 So. 485 (1935)	12
Betts v. *Brady*, 316 U.S. 455	24
Bridges v. *Wixon*, 326 U.S. 135	20
Cash v. *Culver*, 2 L.Ed. 2d 1155, 1548	3
Chandler v. *Fretag*, 348 U.S. 3	7, 24, 25
Cochran v. *Kansas*, 316 U.S. 255	29
DeMerleer v. *Michigan*, 329 U.S. 663	9
Duke v. *State*, 106 Fla. 205, 142 So. 886 (1932)	20
Durley v. *Mayo*, 351 U.S. 277	29, 30
Gibbs v. *Burke*, 337 U.S. 773	9, 10, 20, 29, 30, 31
Hatcher v. *State*, 74 Fla. 112, 76 So. 694 (1917)	11
Hawk v. *Olson*, 326 U.S. 271	25, 26, 28
Henderson v. *State*, 135 Fla. 548, 185 So. 625 (1938)	11, 13
Holiday v. *Johnson*, 313 U.S. 342	29
House v. *Mayo*, 324 U.S. 42	9, 21, 28
Johnson v. *Mayo*, 158 Fla. 264, 28 So. 2d 585 (1946)	8
Johnson v. *State*, 157 Fla. 328, 25 So. 2d 801 (1946)	12
Krulewich v. *United States*, 336 U.S. 440	19
Land v. *State*, 59 So. 2d 370 (Fla. 1952)	11
Lee v. *State*, 115 Fla. 30, 155 So. 123 (1934)	12
Marino v. *Ragen*, 332 U.S. 561	9
Moat v. *Mayo*, 82 So. 2d 591 (Fla. 1955)	31
Padgett v. *State*, 53 So. 2d 106 (Fla. 1951)	12, 16
Palko v. *Connecticut*, 302 U.S. 319	15, 24
Palmer v. *Ashe*, 342 U.S. 134	6, 8
Pennsylvania v. *Claudy*, 350 U.S. 116	28
People v. *Nitzberg*, 287 N.Y. 183, 38 N.E.2d 490, 40 N.E.2d 40, 138 A.L.R. 1253 (1941)	14
Powell v. *Alabama*, 287 U.S. 45	9, 25
Pyle v. *Kansas*, 317 U.S. 213	29
Rice v. *Olson*, 324 U.S. 786	9, 21, 29
Shuler v. *State*, 57 So. 2d 336 (Fla. 1952)	19

Page

Sneed v. *Mayo*, 66 So.2d 865 (Fla. 1953) 10, 11
State v. *Mayo*, 87 So.2d 501 (Fla. 1956) 30, 31
Townsend v. *Burke*, 334 U.S. 736 ..... 10, 21
Tomkins v. *Missouri*, 323 U.S. 485 29
Uveges v. *Pennsylvania*, 335 U.S. 437 9
Varnum v. *State*, 137 Fla. 438, 188 So. 346 (1939) 12, 13
VonMoltke v. *Gillies*, 332 U.S. 708 ..... 9, 19
Wade v. *Mayo*, 334 U.S. 672 ..... 6, 8, 9, 10, 21
Waley v. *Johnston*, 316 U.S. 101 ..... 28, 30
Washington v. *Mayo*, 77 So. 2d 620 (Fla. 1955) .. 30
Williams v. *Georgia*, 349 U.S. 375 ..... 26, 27
Williams v. *Kaiser*, 323 U.S. 471 ..... 9, 28, 29

STATUTES:

Florida Statutes 1957 (cited F.S.)
§90.10 23
§90.14 25
§810.01 ..... 3, 19, 21
§833.01 19
§833.04 19
§909.21 8
§924.17 21
§924.23 21
§932.33 25
Florida Session Laws (cited L.)
L. 1955 c. 29927 25
L. 1957 c. 57-383 19

OTHER CITATIONS:

Florida Jurisprudence, Vol. 13, Evidence, §§143-151 16
Goldstein, Trial Technique (1935), 354 29
H.R. 8361, 85th Cong. 31
H.R. Rep. No. 1293, 85th Cong., 2d Sess., p. 32 31
Sen. Rep. No. 2228, 85th Cong., 2d Sess., p. 33 31
Wigmore, Evidence
§§1029, 1032 23
§§2056, 2059 14
N. Y. Times, August 16, 1958, p. 4 31

Questions Presented

1. The petition for habeas corpus complains of deprivation of right to counsel, alleging that petitioner's state court conviction of burglary, for which he is now serving a fifteen-year sentence, took place under the following circumstances:

> Petitioner, an uneducated farm boy of twenty, had had a hung jury on his previous trial for the same burglary charge, then defended by his own paid lawyer. That lawyer withdrew a week before retrial opened, without prior notice. Petitioner's mother on his behalf then tried to engage "a number" (unspecified) of lawyers, but they all refused to serve, telling her the fee she could offer was inadequate and the time for preparation too short. On retrial day petitioner moved for continuance to engage counsel or, alternatively, for court appointment of counsel. At this time petitioner called the trial judge's attention to his youth, his lack of education and courtroom experience, and the sudden withdrawal of prior counsel. The trial judge denied the motion, and petitioner then attempted to conduct his own defense. The retrial involved difficult problems of evidence and of defense tactics, arising out of the prosecution's use of accomplice testimony. This time the jury convicted petitioner. A first offender, he was sentenced to the fifteen-year term he is now serving (R. 2-4).

Does this habeas corpus petition state a prima facie case?

2. Certain of the essential allegations of the sworn petition are in the form of extracts from a newspaper account of the retrial, viz., statements of events occurring in open court and statements of the newspaper reporter's impression from those events, that petitioner did not competently defend himself. Are these newspaper extracts proper for consideration as allegations in support of petitioner's claim that he was deprived of his right to counsel?

Statement of the Case

The record below consists only of the petition for writ of habeas corpus addressed to the Supreme Court of Florida (R. 1-19), and that court's denial of the petition (R. 20). The petition was verified November 25, 1957 (R. 20). The record omits the filing date of the petition but shows that that court denied it within the fortnight, by order dated December 10, 1957 (R. 20), without opinion.

The petition, diffuse and argumentative, recites (and its content demonstrates) that it was prepared without counsel (R. 1).[1] We select the following as its essential allegations:

On December 6, 1954, petitioner was tried by jury on a burglary charge[2] (R. 2). He was then represented by paid and experienced criminal trial counsel (R. 11). That trial resulted in a hung jury (R. 2).

Petitioner was immediately then placed in solitary confinement. He remained there for two and a half months awaiting retrial, which took place on Monday, February 21, 1955. Petitioner did not know the date scheduled for retrial until the day before it took place. At some date unspecified after the first trial, petitioner's paid counsel moved to withdraw, and the motion was granted. Petitioner, however, was informed of the withdrawal only a few days before the trial, through a prison official.

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[1] Undersigned counsel entered the case under appointment by this Court, *Cash* v. *Culver*, 2 L.Ed. 2d 1548, after the Court granted petitioner's motion to proceed *in forma pauperis* and for writ of certiorari (R. 21), 2 L.Ed. 2d 1155.

[2] "Breaking and entering to commit a felony", i.e., FS §810.01, a noncapital felony punishable by up to twenty years imprisonment. Petitioner's sentence was for fifteen years (R. 3).

Just how many days before the trial he was informed is not clear, for the petition recites both petitioner's own statement that it was four days before retrial and the prosecuting attorney's statement that it was seven (ib.). During these few days prior to trial, be it four or seven, petitioner's mother attempted to engage counsel for him. She consulted "a number" (unspecified) of lawyers, who all rejected the case because the fee she was able to offer was inadequate and the time for preparation too short.

At the opening of the retrial, petitioner moved for continuance on the ground that he needed time to employ new counsel, and that he had not been informed either by his old counsel or by the court that trial day was to be that day. The prosecutor informed the trial judge of petitioner's mother's efforts to obtain substitute counsel. In the words of a newspaper account of the trial which is incorporated into the sworn petition:

> "Duncan [the prosecutor] said he talked with Cash's Mother last week and she told him she was going to get a lawyer that day" (ib.).[3]

In the alternative, petitioner's motion was for appointment of counsel:

> "Petitioner explained to the Court that he was not capable of representing himself, that he was only 20 years of age and was uneducated and had never heard a court trial except the one time he was tried on the same charge, and then he was represented by Mr. Carr, and that he did not know court procedure or how to conduct his defense, and told the court he had been closely

[3] This passage is one of several in the petition which are in the form of quotations from newspaper coverage of the trial. The propriety of petitioner's reliance on allegations in this form is discussed under Question 2, Point III.

confined in solitary at the Florida State Prison at Raiford, up until the night before, and therefore he had no opportunity to employ new counsel, since the Court had permitted his chosen counsel to abandon him in the face of trial, and it was an absolute necessity that the court grant a continuance, or, in the alternative, for the court to remedy the situation by appointing counsel to represent the petitioner" (R. 3).

The petition does not recite what consideration the trial judge gave the motion, but sets out only that the ground the trial judge stated for the denial was that "the State had gone to great expense to bring witnesses to testify and therefore petitioner would have to stand trial that day" (ib.). The trial then proceeded at once. The petition does not purport to summarize the whole trial, but the following episodes are revealing:

Petitioner's co-defendant Lawrence Allen pleaded guilty and testified for the state (R. 3). The petition alleges that "there was nothing that would connect Allen and the petitioner except Allen's word" (R. 4). Allen's testimony, likewise quoted from the newspaper account, "related how he and Cash in company of two others, burglarized stores, stole a truck, and became engaged in a running gun battle with police" (R. 12). The petition fails to state whether petitioner objected to these items of evidence, although it alleges generally that he made a number of unspecified objections to the introduction of evidence (R. 14). The petition alleges specifically, however, that petitioner did object to the introduction of a revolver, taken from the store he was charged with burglarizing (R. 14). This weapon turned up in California in possession of Allen when Allen was arrested there (R. 3).

Allen also testified that he, Allen, had "pulled a $180,000 robbery" in New Orleans, in which petitioner took no part

although two of petitioner's older brothers, Virgil and Fred Cash took part (R. 11). Allen further testified that one of these brothers, Fred, had also taken part in the crime for which petitioner was on trial (R. 17-18). The petition likewise does not show whether petitioner objected to this testimony.

On conviction, petitioner, a first offender, was sentenced to the fifteen-year term he is now serving (R. 13). The state's witness against him, Allen, an ex-convict, was sentenced to ten years but placed on probation. No charges were brought against either Fred Cash or against John Fulford, the fourth person named by Allen as a participant in the crime for which petitioner was convicted (R. 18).

Summary of Argument

I

Under the line of decisions typified by *Wade* v. *Mayo*, 334 U.S. 672, and *Palmer* v. *Ashe*, 342 U.S. 134, petitioner's state court conviction of burglary after denial of his request for assignment of counsel deprived him of due process of law, because his youth and ignorance made it particularly unlikely that he could protect himself in a trial of any complexity.

In fact, the trial was complex, involving tactical problems in meeting accomplice testimony and its corroboration; and the prosecution took advantage of petitioner's ineffectiveness in his own defense, to introduce highly prejudicial evidence which should have been excluded under state law. This evidence consisted of testimony by the accomplice concerning petitioner's participation in other crimes, offered without meeting any of the exceptions to the rule against such evidence; and testimony, also by the accom-

plice, concerning participation by petitioner's brothers in other crimes in which it was not claimed petitioner had any part. Additionally, the mere fact that the trial was a retrial, and that on the first trial petitioner had achieved only a hung jury although then represented by an experienced criminal lawyer, establishes the need for counsel.

The denial of petitioner's alternative motion for continuance to seek new paid counsel deprived him of his constitutional right to be heard by hired counsel of his own choice, for the denial was arbitrary within the doctrine of *Chandler* v. *Fretag*, 348 U.S. 3. The expense to the state in maintaining prosecution witnesses during a continuance, adduced by the trial judge as the ground for denying the motion, is trivial. The sudden discovery, only a week or less before the retrial, that petitioner's former counsel had withdrawn, gave petitioner too short a time to engage new counsel in view of petitioner's limited funds and the complexity of the impending retrial. The Florida rule that continuance is discretionary does not supply an adequate nonfederal ground for denying continuance to seek paid counsel.

Since petitioner was deprived of counsel over his objection, he was deprived of due process.

II

The Court should not decline to consider those allegations of the petition which take the form of excerpts from a newspaper account of petitioner's trial, including the reporter's impression that petitioner tried his case incompetently. Since the petition was sworn, petitioner adopted the newspaper account as his own. Since the petition was filed pro se, it is entitled to untechnical construction. Such construction is particularly necessary because this case comes from Florida, for under the Florida statutory and decisional law

against repetitious habeas corpus, petitioner may never have another chance to prove the facts that underlie a poorly phrased allegation.

ARGUMENT

I

Under the Circumstances of the Trial, the Denial of Petitioner's Motion for Assignment of Counsel Deprived Him of Due Process of Law.

Petitioner is serving a fifteen-year (R. 4) penitentiary sentence for the noncapital crime of burglary, "breaking and entering with intent to commit a felony" (R. 2), F.S. §810.01. Although at the opening of his trial petitioner requested assignment of counsel[4] (R. 3), Florida law, as this Court has recognized, does not require assignment of counsel in noncapital prosecutions. F.S. §909.21; *Johnson* v. *Mayo,* 158 Fla. 264, 28 So. 2d 585 (1946); certiorari denied, 329 U.S. 804; rehearing denied, 329 U.S. 835 (818); *Wade* v. *Mayo,* 334 U.S. 672, 675, 679. This case, therefore, involves another of the many applications of the settled doctrine, summarized in the opening words of *Palmer* v. *Ashe,* 342 U.S. 134, 135:

> "This Court has repeatedly held that the Due Process Clause of the Fourteenth Amendment requires states to afford defendants assistance of counsel in noncapital criminal cases when there are special circumstances showing that without a lawyer a defendant could not have an adequate and a fair defense."

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[4] We shall argue as a separate Point II the alternative head of the same motion, in which petitioner applied for continuance to engage private counsel.

One of the catalogues of such circumstances is that in *Uveges* v. *Pennsylvania*, 335 U.S. 437, 441, where this Court said that counsel was required:

> "[w]here the gravity of the crime and other factors —such as the age and education of the defendant, the conduct of the court or the prosecuting officials, and the complicated nature of the offense charged and the possible defenses thereto—render criminal proceedings without counsel so apt to result in injustice as to be fundamentally unfair."

Petitioner stood trial. What happened illustrates the observation in *Gibbs* v. *Burke*, 337 U.S. 773:

> "A defendant who pleads not guilty and elects to go to trial is usually more in need of the assistance of a lawyer than one who pleads guilty." 337 U.S. at 781.

We shall show that the trial was constitutionally offensive in every category just quoted from the list in *Uveges* v. *Pennsylvania*, 335 U.S. 437. Petitioner's own view of the case stressed his youth and ignorance.[5] We rest the case equally upon the complexity of the trial judgments petitioner had to make, *Rice* v. *Olson*, 324 U.S. 786, 789; *Williams* v. *Kaiser*, 323 U.S. 471, 474-475; *VonMoltke* v. *Gillies*, 332 U.S. 708, 721-722, and on the failure of the trial judge

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[5] The petition itself emphasizes petitioner's youth (age 20—R. 3), that he is "uneducated" (no detail given except that he is a farm boy—R. 12), and his lack of prior experience in court (limited to being present while his first counsel conducted his first trial—R. 3), as demonstrating the need for counsel (R. 13). His petition (R. 13) argues particularly from *Wade* v. *Mayo*, 334 U.S. 672, 683-684, which was also a not-guilty plea from Florida. Some of the many other cases involving the factors of youth and ignorance, whether in guilty plea or trial situations, are: *Powell* v. *Alabama*, 287 U.S. 45, 69; *House* v. *Mayo*, 324 U.S. 42, 45; *Uveges* v. *Pennsylvania*, 335 U.S. 437, 439; *Marino* v. *Ragen*, 332 U.S. 561, 562; *deMeleer* v. *Michigan*, 324 U.S. 663.

to "guide a defendant without a lawyer past the errors that make trials unfair," *Townsend* v. *Burke*, 334 U.S. 736, 740; *Gibbs* v. *Burke*, 337 U.S. 773, 781; for the face of the petition discloses petitioner's fumbling and ineffectual efforts during the trial to protect himself not only against the admissible evidence, but also against evidence that was patently irrelevant and prejudicial.

In *Sneed* v. *Mayo*, 66 So. 2d 865, 875 (Fla. 1953), the Supreme Court of Florida, deferring to *Wade* v. *Mayo*, 334 U.S. 672, announced the policy of granting habeas corpus in noncapital cases, to investigate allegations of denial of counsel to the young and ignorant, even though there were then no such allegations of detailed mishandling of the ensuing trial as in the petition here. For that reason we think the instant action of that court, denying this petition outright, explicable only because this petition buried its allegations of clearly remediable facts under a mass of other charges, some immaterial, some frivolous and some simply speculative.

The petition for habeas corpus is cast in the pathetic jumble of the half-literate and the pretentiously legalistic which is the mark of the prison-made pro se document. We have had to extract the factual allegations here compressed into our Statement, from a strident catalogue of other grievances. See, for example, the allegation comparing the accomplice witness Allen's wealth and petitioner's poverty (R. 3); the argument concerning the Florida law of continuances (R. 9, 10); the suggestion of sinister purpose in the solitary confinement (R. 10, 18), and in the failure of the prosecution to file charges against two other persons named in Allen's testimony (R. 18); the general charge, stated in the form of a rhetorical question, that there was a three-cornered conspiracy between the prosecutor, the accomplice witness Allen, and petitioner's former paid

attorney, to have the attorney withdraw (R. 11); and the speculation that the trial judge might have been bribed (R. 17). Small wonder, if no constitutional excuse, that the busy Supreme Court of Florida[6] did not find the patience to winnow from this mass of irritating chaff, submitted pro se, the relatively few and scattered allegations that we assert make this a hornbook case of deprivation of the right to counsel.

A—Accomplice Testimony and Its Corroboration

The essential testimony connecting petitioner with the crime was that of the co-defendant Lawrence Allen, who testified in detail that he, petitioner, and two others committed the burglary (R. 4, 12). A number of items of loot, including a revolver from the burglarized store, all found in Allen's possession when he was arrested in California several months after the burglary, were received in evidence for corroboration (R. 3, 12).

Florida is one of the states which do not require that accomplice testimony be corroborated at all, *Bacon* v. *State,* 22 Fla. 52 (1886); *Hatcher* v. *State,* 74 Fla. 112, 76 So. 694 (1917); *Land* v. *State,* 59 So. 2d 370 (Fla. 1952). Since in Florida the suspect origin of such testimony goes only to its weight, Florida law has developed a number of trial techniques directed to disclosing lack of weight. For example, the accomplice witness may be cross-examined on whether he is testifying under agreement for leniency, *Henderson* v. *State,* 135 Fla. 548, 185 So. 625, 626-627, 628 (1938). Again, the defendant may demand that the trial judge charge the jury on the weight of accomplice testimony, that it must be received "with great caution"; and

[6] The petition was filed in that court (R. 1), as a matter of original cognizance. The procedure is explained in *Sneed* v. *Mayo,* 66 So. 2d 865, 874 (1953).

omitting the one word "great" from the charge is error. *Varnum* v. *State*, 137 Fla. 438, 188 So. 346 (1939);[7] see also *Padgett* v. *State*, 53 So. 2d 106 (Fla. 1951), cited below in another connection. Likewise, a careful trial probing of the accomplice testimony, even though it does not convince the jury, will occasionally lead the Florida Supreme Court to reverse on the ground that "justice will be subserved by ordering a new trial because the admitted testimony does not bear on its face the indicia of a truthful narration of facts." *Lee* v. *State*, 115 Fla. 30, 155 So. 123, 129 (1934).

The newspaper account of the trial described petitioner's attempt at defense:

> "While making objections and inquiring of the Judge and witnesses, Cash appeared unsure of himself. On several occasions he would start a sentence, then stop to rephrase it or start on another subject. Before making objections Cash raised his hand to attract the attention of the Judge, then in a halting manner would make his statement" (R. 14-15).

We submit that a layman laboring under the handicaps so described could not be expected to know how to wield the several trial weapons we have just inventoried, although Florida law supplied them ready to his hand. Had the trial judge given thought to the trial ahead when he denied petitioner counsel, he must have known that petitioner would not have been able on cross-examination to test the credibility of the accomplice witness by exploration of details (*Lee*). Similarly, the trial judge must have known that no layman could be expected to know that a deal with

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[7] At one time a defendant was even entitled to this cautionary instruction at the very point when the accomplice took the stand, *Bass* v. *State*, 121 Fla. 208, 163 So. 485 (1935), overruled *Johnson* v. *State*, 157 Fla. 328, 25 So. 2d 801 (1946).

the prosecution for leniency (*Henderson*) is not the usual thing that the ignorant may assume, but a proper subject of merciless inquiry and bitter comment that frequently leads a jury to acquit. Similarly, the trial judge must have known that no layman could be expected to know he had a right to submit a draft jury charge, or the effect therein of the small word "great" (*Varnum*).

Although the prosecution did not have to corroborate under Florida law, it undertook to do so. The newspaper account continues:

> "State Attorney Ted Duncan today began the laborous (*sic*) process of corroborating testimony that Ray Cash participated in a burglary here last year.
>
> "Yesterday, Lawrence Allen, a friend of Cash's for over four years took the stand for an hour and a half and related how he and Cash in company of two others, burglarized stores, stole a truck and became engaged in a running gun battle with police. Duncan said today he would call most of the State witnesses to corroborate Allen's account of the crime" (R. 12).

This corroboration, as already noted, consisted of loot from the burglary, identified by other witnesses as turning up in the accomplice's possession.[8] Such corroboration, however, corroborates only the fact that the witness was himself connected with the crime. It establishes that the witness is not a masochist seeking his own destruction, but it does not establish that he is not a liar seeking to save himself

---

[8] The only item clearly identified is a revolver, but the petition's language suggests other items: "It should be noted that all of the evidence introduced by the State was taken from the car and house trailer of the co-defendant Allen" (R. 3). The newspaper account reports that "over twenty items of evidence linking [Cash] to the burglary" were placed in evidence at the prior trial, but does not specifically show whether they were used at the retrial too (R. 12).

by causing the destruction of his co-defendant, for it does not connect the defendant with the crime. In recognition of this infirmity in the probative force of such corroboration, some states reject it and require corroboration not only of the accomplice's testimony that the accomplice took part in the crime but of the accomplice's testimony that the defendant took part as well. The statutes are collected, *Wigmore, Evidence*, §2056, the cases ib. §2059, to the point that in some twenty states there must be what was lacking here, corroboration of the identity of the defendant as a participant in the crime.

A New York case arising from one of the spectacular Murder, Inc. prosecutions points out the illogic and the danger of the practice followed here:

> "Each and every of the matters sworn to by the non-accomplice witnesses was undisputed by the defendant. Not a single item of the testimony of any of them had any applicability whatsoever to his *identity as a participator in this crime.* So, indeed, the trial judge ruled. In that state of the case the question is whether we can sustain the further ruling that such independent testimony was none the less to be used by the jury in constructing for the accomplice-witness Reles a general credibility that would perhaps amount to a sanction for his narration of the vital and controverted particulars of his story against the defendant. * * * We think it unnecessary to probe this idea that a strong implication of the non-credibility of a witness may be rebutted by independent evidence which confirms in his confession of the very criminality which gives rise to that implication. *Whatever its merits, such a process, we believe, is not fit for the trial of issues on which life and liberty depend.*" *People* v. *Nitzberg*, 287 N.Y. 183, 38 N.E.2d 490, 40 N.E.2d 40, 138 A.L.R. 1253, 1257-1258, emphasis supplied.

It is not necessary to our point that we should urge that a requirement of corroborating the defendant's participation be erected into a Fourteenth Amendment constitutional right, for that may well not be "of the very essence of a scheme of ordered liberty," as these matters have been phrased since *Palko* v. *Connecticut*, 302 U.S. 318, 325. But a procedure subject to such denunciation as that just quoted from the New York court, if tolerable under appropriate precautions against misapplication, becomes intolerable when the trial proceeds without the restraint of defense counsel's professional training to distinguish the specious and damn the prejudicial as did the New York court. The unlearned and tongue-tied young Cash can hardly be regarded as fit to argue to a jury the lack of probative force of such corroboration, when that very question of its probative force is a subject of dispute even among learned scholars of the law.

B—Testimony Concerning Petitioner's Participation in Other Crime

The newspaper account of the trial, excerpted into the sworn petition, reports:

> "Yesterday, Lawrence Allen, a friend of Cash's for over four years, took the stand for an hour and a half and related how he and Cash in company of two others, burglarized *stores*, stole a *truck*, and became engaged in a running *gun battle* with police" (R. 12, emphasis supplied).

The crime charged against petitioner was breaking and entering to commit *a* single felony (R. 2), *a* single larceny (R. 12), viz., from the Linzmayer store (R. 14).[9] But

[9] We may follow respondent off the record by referring to the "Information for Breaking and Entering" supplied by respondent

Allen's testimony convicted Cash not only of this sole crime charged but of a general criminal career, for the emphasized words in the record passage just quoted relate to at least one other burglary, as well as the separate crimes of car theft and resisting arrest.

Florida has the standard rule that testimony of other crimes is inadmissible, subject to well-settled exceptions as to use to identify the defendant, to show plan or purpose, or to impeach. The many cases are conveniently collected in 13 *Fla. Jur., Evidence,* §§143-151. By the time of petitioner's 1955 trial it had become settled in Florida, however, that those exceptions obtain only where there is some evidence other than that of an accomplice, to identify the defendant as a participant in the principal crime charged. Just a few years before petitioner was tried, the Supreme Court of Florida, in *Padgett* v. *State,* 53 So. 2d 106 (1951), had reversed a burglary conviction where the accomplice alone had given testimony of the defendant's participation in two other burglaries and a car theft. The Florida court reasoned:

> "In all cases where testimony of other crimes has been admitted there has been at least *some evidence to connect the defendant with the crime in question,* and evidence of other crimes was admitted for the purpose

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as an exhibit attached to his typewritten brief already filed in this Court in opposition to the petition for certiorari. The information charges "that Ray Cash and Lawrence Allen of the County of Alachua and State of Florida, on the 4th day of April, in the year of our Lord one thousand nine hundred and fifty four in the County of Alachua and State of Florida, did then and there break and enter a certain building there situate, to-wit: a store building the property of one George J. Linzmayer, Jr. with intent to commit a felony to-wit: the crime of larceny, of the property, goods and chattels of another, of the value of more than Fifty ($50.00) dollars, contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the State of Florida."

of identifying the defendant; or of proving the plan, intent, or knowledge of the defendant; or to show that the acts charged against him were not the result of accident, mistake, or inadvertence. See *Nickels* v. *State,* 90 Fla. 659, 106 So. 479, 488; *Wallace* v. *State,* 41 Fla. 547, 26 So. 713; *Bronson* v. *State,* 117 Fla. 828, 158 So. 435; *Wilson* v. *State,* 134 Fla. 199, 183 So. 748; and *Talley* v. *State,* 160 Fla. 593, 36 So. 2d 201.

"*In the instant case there is not an iota of testimony except Walden's* [the accomplice witness] *to connect the defendant with the crime for which he is charged.*

"The trial judge apparently admitted the testimony regarding these other crimes on the theory that they showed a general plan, which is one of the recognized exceptions to the rule forbidding admission of such testimony. There are literally thousands of cases in this country discussing the admission of such evidence. See the elaborate notes in 62 L.R.A. New Series 193; 26 L.R.A. New Series 466; 43 L.R.A. New Series 667; 46 L.R.A. New Series 866; 48 L.R.A. New Series 236; L.R.A. 1915A, 138 and 809; L.R.A. 1915B, 103; L.R.A. 1917D, 388; 3 A.L.R. 1540; 22 A.L.R. 1016; 27 A.L.R. 358; 63 A.L.R. 603; and 105 A.L.R. 1288. We find none which admitted such evidence when there was such an utter failure to connect the defendant with the charged crime." 53 So. 2d, at 107-108, emphasis supplied.

Thus it may be stated with certainty that Florida law forbids other-crime testimony in cases where the accomplice's identification of the defendant is not corroborated, notwithstanding Florida does not ordinarily require any corroboration at all. Hence permitting the accomplice Allen to testify about other burglaries, the auto theft, and the

gun battle with police (R. 12), was prejudicial error even under Florida law, under the allegation of the petition that "there was nothing that would connect Allen and the petitioner except Allen's word" (R. 4).

C—Guilt by Association: Testimony Concerning Crime Committed by Petitioner's Brothers But Not by Petitioner

Still more prejudicial than the foregoing testimony of petitioner's participation in other crimes was testimony of other crimes in which petitioner did *not* participate. The same informer-witness Allen was permitted to testify that he, together with petitioner's two older brothers, Virgil and Fred Cash, committed a $180,000 robbery in New Orleans, although petitioner was not there at all (R. 11).

This testimony was patently irrelevant as proof of the specific Florida burglary for which petitioner was on trial, but it had the effect of convicting petitioner through the imputation of guilt by association. The sting of this testimony lies in the fact, albeit clumsily alleged in the petition, that it was common knowledge that petitioner's brothers Virgil and Fred were part of the notorious criminal group known as "the Cash gang." The petition, in its pathetic jumble of assertion, hint and argument, puts it as follows:[10]

> "[W]hy did the Hon. Ted Duncan fail to file charges against John Fulford and Fred Cash, in this case when Lawrence Allen, the big time gangster named them as being with him when he robbed the store.
>
> "Every one who knows anything about what was known as the 'Cash' gang, knows that Ray Cash, was not a

[10] Typically, this passage occurs in the middle of a discussion of an entirely different subject, the suggestion of collusion between prosecutor, accomplice witness, and former defense attorney. (R. 10-12).

> member of that gang and that his older brother Virgil and Fred Cash would never let their baby brother hang around with them much less take part in their criminal activities. This gang was known as big time operators as the testimony of one of its old members, Lawrence Allen shows he and the other members pulled a $180,000 robbery in New Orleans, and the petitioner, Ray Cash, was not there" (R. 10-11).

The petition elsewhere states more directly that Allen had testified that petitioner's brother Fred was one of the participants in the burglary for which petitioner was on trial (R. 17-18). This identification of petitioner's brother may have been admissible as part of the direct circumstances of the crime charged. But the additional testimony that this brother, together with the informer and petitioner's other notorious brother Virgil, committed the New Orleans robbery, could have no purpose or effect other than to make petitioner out to be a member of the Cash gang. Once that membership was so established, petitioner was exposed to all the grudgingly suffered perils of a prosecution for conspiracy, *VonMoltke* v. *Gillies,* 332 U.S. 708, concurring opinion of Mr. Justice Frankfurter, at 727-728; *Krulewich* v. *United States,* 336 U.S. 440, concurring opinion of Mr. Justice Jackson, at 445, *et seq.,* while purportedly on trial for a single substantive offense. Yet conspiracy in Florida was as late as petitioner's 1955 trial a one-year county jail misdemeanor, F.S. §833.01, *Shuler* v. *State,* 57 So. 2d 336 (Fla. 1952), not the twenty-year felony, F.S. §810.01, for which petitioner was convicted and is now serving fifteen years in the state penitentiary.[11]

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[11] Even under the more recent statute, L. 1957 c. 57-383 §2 (FS §833.04), the maximum penalty for conspiracy to burglarize would have been five years.

Florida law knows that testimony of crime committed by members of the defendant's family is a particularly dangerous violation of the *res inter alios acta* rule, even when the crime is brought home much closer to the offense charged than it was here. *Duke* v. *State,* 106 Fla. 205, 142 So. 886 (1932), defendant's father's interference with prosecution witness. More than that, when the trial court permits the introduction of such evidence of the offenses of other people, the procedure

> "ignores the traditional American doctrine requiring personal guilt rather than guilt by association or imputation before a penalty or punishment is inflicted." *Bridges* v. *Wixon,* 326 U.S. 135, concurring opinion of Mr. Justice Murphy, at 163.

In the inclusion of this evidence both of other crime with which it was claimed petitioner was connected and of other crime on which that claim was not even made, the proceedings described in the newspaper account thus matched the nightmare trial in *Gibbs* v. *Burke,* 337 U.S. 773. There, it will be recalled, violations of the state law of evidence in introducing hearsay, and in requiring the defendant to make a hostile witness his own so that he could not be impeached, and in failing to exclude the jury while instructing the defendant on his privilege not to take the stand, were held to show that the defendant was "handicapped by lack of counsel to such an extent that his constitutional right to a fair trial was denied," 337 U.S. at 781.[12] Perhaps the trial

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[12] We do not press petitioner's complaint of the disparity of the fifteen-year sentence which he received although a first offender, and the suspended ten-year sentence whereby the ex-convict accomplice was rewarded (R. 17). But since the fifteen-year sentence seems remarkably severe for a first offender it suggests that the trial court was compounding on sentence one of the errors we have attributed to the trial, viz., letting petitioner be punished for the crimes of the Cash gang. It would have been the proper

this section, such counsel shall file a written report as to the duties performed by him and apply for discharge by the court.

"The compensation of counsel for the defendant, at the trial, shall not exceed five hundred dollars; and defendant's counsel's compensation on appeal, shall not exceed five hundred dollars additional."

§924.17 (2 Florida Statutes 1957, p. 2972)
Costs when appellant is insolvent.—

"In case the appellant shall be utterly unable to pay the costs of the cause, whether it be capital or not, either in whole or in part, and shall himself make oath before the court or the clerk thereof, and shall also by credible testimony establish satisfactorily to the court that he has no property or other means of payment either in his possession or under his control and has not divested himself of his property for the purpose of receiving benefit from this oath, and is also utterly unable to enter into the bond required to secure the payment of the judgment, fine and costs, the appeal shall be a supersedeas without such payment if the defendant remain in custody, or, in cases not capital, upon his entering into bond with two or more sufficient sureties, conditioned that he shall be personally forthcoming to answer and abide the final order, sentence, or judgment that may be passed in the premises by the appellate court, and also conditioned for his appearance before the court in which the cause was originally determined; provided, however, that if the appellant is in official custody in a state or federal prison or county or municipal jail or other penal institution or place of confinement, it shall not be necessary for him to make such oath before the court or to its clerk, and, in lieu thereof, he may present to the court his affidavit to the matters hereinabove required to be established, made before a notary public or other officer authorized to administer oaths, and, thereupon, the court shall

opportunities discussed above under "Accomplice Testimony and Its Corroboration" might have required an advocate of some little wit and learning to seize, but we submit that any man of the law would at least have objected to introducing the testimony of other crime committed by petitioner and of still other crime committed by his gangster brothers without him. The most incompetent courthouse lounger or the newest cub at the bar, had the trial court seen fit to assign the case to counsel, would thus either have had the evidence excluded or have had such errors easily reversed on appeal.[13] But be the emphasis laid on the gross trial errors or on the subtle trial problems, the result is the same. The actual trial of this accomplice case required professional technique "obviously beyond the capacity of even an intelligent and educated layman, and which clearly demands the counsel of experience and skill," *Rice* v. *Olson*, 324 U.S. 786, 789.

We do not contend that petitioner's bare allegation that he was incapable of defense would have been sufficient. But here that allegation is supported by detailed evidentiary allegations as to his age, his lack of courtroom experience, the seriousness of the charge (evidenced by the twenty year sentence permissible under the statute), and the difficulty of the case (evidenced by the complex of trial problems that we have reviewed). Those allegations at least demand answer, we submit, although they are pleaded so badly that they can be seen only through a blur of irrele-

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function of defense counsel to see to it here too that the trial judge was at least explicitly reminded of the unfairness of sentencing for the crimes of others. Cf. *Townsend* v. *Burke*, 334 U.S. 736, 741.

[13] Florida's refusal to allow counsel in a noncapital case, FS §810.01, which generated this case, *Wade*, *House*, and many others, relates to counsel only. Even in a noncapital case, the pauper's oath in Florida covers all appeal costs including reporter's transcript, FS §§924.17, 924.23.

either enter an order of insolvency or shall require further evidence in behalf of the appellant and/or the state and then grant or deny an order of insolvency according to whether he deems the insolvency of the appellant to be satisfactorily established or not."

§924.23 (2 Florida Statutes 1957, p. 2972)
Transcribing and filing notes of stenographic reporter upon appeal by defendant.—

"When notice of appeal is filed by the defendant the trial court shall direct the stenographic reporter to transcribe his notes of the proceedings. The reporter shall certify to the correctness of the notes and the transcript thereof, and shall file the notes and the transcript with the clerk. If the prosecuting attorney or counsel for the defendant questions the correctness of the notes or transcript the question shall be settled by the court. The defendant shall pay the costs of such stenographic report, unless he is insolvent, when the costs shall be paid by the county."

vancies. That same incapacity in advocacy which is the very gravamen of the petition likewise excuses petitioner from any requirement of lawyer-like statement even as to that incapacity.

How he would demonstrate that incapacity, if permitted to prove it by trial of a denial of it on return to a writ issued, is matter of detail beyond the present occasion. Investigation of such school record as he may have had, of scores in school or selective service intelligence tests taken under circumstances not suggesting malingering, observation by psychiatrists, performance under psychologists' projective tests, all suggest themselves. The trial record itself, which should be introduced into the habeas corpus hearing as an exhibit, would be almost conclusive if it confirmed the petition's showing that petitioner and the trial judge between them botched the conduct of his defense.[14]

D—Retrial After Hung Jury

Indeed we urge that this case need not turn on the weighing of such variables but lends itself to a simple rule of thumb arising out of the fact that a hung jury was the best that former paid counsel, an experienced criminal trial lawyer (R. 11), had been able to obtain. The rule of thumb would be that any defendant who has had a hung jury on one trial needs counsel on retrial. This Court must judicially know that hung juries are so rare, and sudden withdrawals of counsel thereafter so much rarer, that such a rule of thumb will not materially burden the administration of justice. Imposing the requirement of counsel in such cases need not rest merely on the technician's recognition

[14] Undersigned counsel is informed by letter from the court reporter that the trial notes have been preserved and transcript is available on payment of standard fees.

that a layman will inevitably be baffled—as what young lawyer was not?—by the nice rules for laying the foundation for impeachment by prior inconsistent testimony, *Wigmore, Evidence,* §§1029, 1032,[15] if indeed a layman will know that such impeachment is even authorized. We assert that since presumably reasonable jurors have differed on guilt when the defendant has been represented by counsel, the desperate need for counsel on retrial is patent as a matter of elementary fairness and therefore of due process. With the case so delicately poised that the presence of counsel has in the past served only to keep it in balance, no society that claims to treasure the right to counsel can view retrial conviction in counsel's absence with anything other than shame.

II

Quite Apart From the Circumstances of the Trial, the Denial of Petitioner's Alternative Motion for Continuance to Engage Counsel Deprived Him of His Specific Constitutional Right to Paid Counsel of His Own Choice.

Petitioner's application for assignment of counsel, discussed in the preceding Point of this brief, was in the form of an alternative motion, whose other head was an application for continuance to engage new private counsel to replace withdrawn private counsel (R. 2, 3). As detailed in the Statement, petitioner learned of the withdrawal only a week or less before the date set for retrial, and did not even know when retrial was to take place until the day

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[15] *Wigmore,* at the points cited in the text, points out that the rules vary from state to state. A person ignorant of the law of all states on these matters could hardly be expected to stumble on to the very procedure which would meet the law of any one state. In Florida, although impeachment by prior trial testimony is controlled by statute requiring a prescribed form of foundation question, FS §90.10, there are exceptions not apparent on the face of the statute. *Alford* v. *State,* 47 Fla. 1, 36 So. 436, 438 (1904).

before it happened, but his mother was during that time trying to hire substitute counsel. The petition recites that the trial judge was made aware of her attempt at the time of the motion, but it does not recite whether the trial judge then knew the fact that she had been turned down by "a number" of lawyers, that "none would accept the case for the amount of money she was able to offer them," and "they all refused because of the fee and also on the grounds that there was too little time to prepare a defense" (ib.). The trial judge denied the continuance, the petition alleges, "on the grounds the State had gone to great expense to bring witnesses to testify and therefore petitioner would have to stand trial that day" (R. 3).

In *Chandler* v. *Fretag,* 348 U.S. 3, holding habeas corpus available to correct failure of a state trial court to grant a continuance to get paid counsel in a trial on short notice, this Court explicitly referred to and applied Mr. Justice Cardozo's conception, in *Palko* v. *Connecticut,* 302 U.S. 319, 325 at n. 2, that the right of a defendant to counsel in a criminal case is one of those few in the Bill of Rights which the Fourteenth Amendment makes as binding on the states as on the federal government. The Court, resting the case on *Palko* and distinguishing *Betts* v. *Brady,* 316 U.S. 455, said:

> "Regardless of whether petitioner would have been entitled to the appointment of counsel, his right to be heard through his own counsel was unqualified," 348 U.S., at 9.

Doubtless the right would be subject to limitation in proper cases, for there is notorious danger of abuse in continuance. See *Acree* v. *State,* 153 Fla. 561, 15 So. 2d 264 (1943). But here the sole ground of refusal of continuance reported in the petition was expense to the state. The petition does

not set out the expense, but it is difficult to conceive of any figure for subsistence even of a hotel full of witnesses that would be too high a price to require a civilized legal system to pay for fair trial.[16] Although the family's means were limited, the period of four days to a week in which petitioner's mother had been vainly seeking a lawyer to take the case at the fee she could offer was hardly enough to justify the assumption that no one could be found to handle the case at that fee, within some reasonable extension of time.

Moreover, the report that the lawyers consulted also turned the case down for the further reason of want of time to prepare indicates that they felt they faced a firm deadline announced in advance, such that a plea for continuance would have been unavailing. While, as stated above, it does not appear from the petition whether their reaction was brought to the trial judge's attention, we submit that it was his affirmative responsibility to inquire into the circumstances and to mould his orders to the facts by correcting such a misunderstanding, if misunderstanding it was. Failing a showing of discharge of that responsibility, his insistence on pushing petitioner to trial constituted, in the analysis that has become standard since *Powell* v. *Alabama*, 287 U.S. 45, 69, quoted at length in *Chandler* v. *Fretag*, 348 U.S. 3, 10, an arbitrary refusal to hear a party by counsel. As the Court put it in *Hawk* v. *Olson*, 326 U.S. 271, another case granting habeas corpus relief to a defendant who had been crowded to jury trial and found guilty after his request for continuance to engage counsel had been denied:

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[16] We should concede that the then statutory rate of $2 per witness per day, FS §§932.33; 90.14 (now $3 per day, L. 1955 c. 29927, §1) is not a fair measure of the expense, for the Florida courts invariably, in our experience, allow necessary additional subsistence to holdover witnesses, by entry of special order.

"The defendant needs counsel and counsel needs time * * *. As to the issue on the motion for continuance, our duty requires us to determine only whether or not the denial under the facts alleged violates due process. We think there was an allegation that no effective assistance of counsel was furnished in the critical time between the plea of not guilty and the calling of the jury. Continuance may or may not have been useful to the accused, but the importance of the assistance of counsel in a serious criminal charge after arraignment is too large to permit speculation on its effect. We hold that denial of opportunity to consult with counsel *on any material step* after indictment or similar charge and arraignment violates the Fourteenth Amendment." 326 U.S., at 268, emphasis supplied.

By way of anticipation, we note that respondent's typewritten brief opposing the petition for certiorari, p. 8, suggests that the well-settled Florida rule, that continuance is discretionary, supplies an adequate if unrecited nonfederal ground for the order below. Since the contention may turn up in respondent's brief on the merits, we now point out that the Court, in *Williams* v. *Georgia,* 349 U.S. 375, 382, 389, has specifically rejected this thought that a federal constitutional right must bow before state court discretion conceived as an adequate nonfederal ground of decision. If the state court has the *power,* under state law, to grant a discretionary motion and thereby to vindicate a federal constitutional right, its discretionary declination to exercise that power does not constitute the adequate state ground which divests this Court's jurisdiction:

"Since his motion was based upon a constitutional objection, and one the validity of which has in principle been sustained here, the discretionary decision to deny the

motion does not deprive this Court of jurisdiction to find that the substantive issue is properly before us," *Williams* v. *Georgia,* 349 U.S. 375, at 389.

In any event, since the motion was double-barrelled, asking only in the alternative for continuance, the existence of some adequate state ground for denying the motion as to continuance could supply no warrant for denying it as to assignment of counsel on denial of the continuance.

III

The Incorporation of a Newspaper Account of the Trial Into the Sworn Petition for Habeas Corpus Constitutes an Adequate Allegation of the Trial Events Recited in the Account.

We discuss this point by way of anticipation, for respondent's typewritten brief already filed here in opposition to the petition for certiorari, pp. 12-13, asserts that petitioner may not rely on newspaper accounts of the trial, in that they were merely "personal observations by an observer of the proceedings, phrased in such a manner so as to attract the eye of the reading public." We assume that the same contention will be made in respondent's brief on the merits.

The nub of the petition, as we have excerpted it in our Statement, consists in some essentials of quotations from a local newspaper account of the trial (R. 2-3, 12, 14, 14-15, 17-18). It seems obvious that the petitioner thereby sought to borrow for his allegations the credibility of existing public print, in preference to statements of his own that a court might be tempted to treat as hallucinations. To be sure, since no testimony has yet been taken, the case comes before this Court for disposition on the face of the petition,

i.e., taking all allegations as true, *House* v. *Mayo*, 324 U.S. 42, 45; *Williams* v. *Kaiser*, 323 U.S. 41; *Hawk* v. *Olson*, 326 U.S. 271, 273, even were they to "tax credulity," *Waley* v. *Johnston*, 316 U.S. 101, 104; see also *Pennsylvania* v. *Claudy*, 350 U.S. 116, 123. But the basic prudence of petitioner's tactic is apparent, although it was unsuccessful below. All things equal, courts plagued with tall tales from the penitentiary in habeas corpus petitions may be expected to treat such a pleading with more respect if it shows that it is not only the pleader who believes the tale.

This way of writing a legal document does make for hard reading. Instead of a specific and direct allegation of petitioner's inability to engage counsel on account of limited funds and lack of preparation time, the petition covers the subject roundabout and indeed hearsay by the newspaper quotation:

> "Mrs. Cash [petitioner's mother], a graying heavy set woman, told the Sun [the newspaper] today that she was unable to get an Attorney because none would accept the case for the amount of money she was able to offer them. She said she spoke to a number of lawyers but they all refused because of the fee and also on the grounds that there was too little time to prepare a defense" (R. 2-3).

Likewise we treat the newspaper report of petitioner's clumsy trial technique, e.g.—

> "While making objections and inquiring of the Judge and witnesses, Cash appeared unsure of himself. On several occasions he would start a sentence, then stop to rephrase it or start on another subject. Before making objections Cash raised his hand to attract the attention of the Judge, then in a halting manner would make his statement" (R. 14-15).

as the full equivalent of direct allegation of a baffled and miserable attempt to cope with a forensic situation that was manifestly beyond petitioner's abilities.[17] This is because, first, these quotations were incorporated into a petition which was itself sworn (R. 20); and, second, because since that petition was filed pro se (R. 1) it is to be accorded a patient and helpful construction, in order to see whether what the petition adumbrates is worth further inquiry into the facts, however oblique the language of the petition. *Holiday* v. *Johnson*, 313 U.S. 342; *Cochran* v. *Kansas*, 316 U.S. 255; *Pyle* v. *Kansas*, 317 U.S. 213; *Rice* v. *Olson*, 324 U.S. 786; *Tomkins* v. *Missouri*, 323 U.S. 485; *Williams* v. *Kaiser*, 323 U.S. 471; *Gibbs* v. *Burke*, 337 U.S. 773.

Moreover, because this is a Florida case, there is special reason for construing the habeas corpus petition in a manner which will give petitioner full opportunity to prove under it, once and for all, any facts that are within his knowledge concerning the occurrences at or in connection with his lawyerless trial. For Florida has its own treacherous maze of statutory and decisional rules against repetitious habeas corpus, as this Court has learned: five members of the then Court felt those rules precluded relief in *Durley* v. *Mayo*, 351 U.S. 277, while the other four members felt it a miscarriage of justice that relief should be so precluded. The Florida doctrine this Court there considered binding on it as to successive habeas corpus cases is:

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[17] For another glimpse of this youngster at bay, see the newspaper account of his bewildered instinctive reaction to the harmful but admissible evidence that a revolver taken from the Linzmayer store turned up in the accomplice witness' car (R. 3, 14): "Cash objected to introduction of the weapon and the box in which it was kept, but was unable to state a valid ground for the objection". The standard elementary text on advocacy warns that such groundless objections do the objector more harm than good. *Goldstein, Trial Technique* (1935), 354.

> "The rule is clear that a convicted prisoner should not be heard to raise in a subsequent proceeding, whatever its nature, issues that were previously raised and determined, or that the prisoner had *a fair opportunity to [raise and have determined] in earlier proceedings.*" *Washington* v. *Mayo*, 77 So. 2d 620, 621 (Fla. 1955), quoted in *Durley*, 351 U.S., at 285, emphasis supplied.

In a case which came down after argument but before opinion in *Durley*, and was not there cited by this Court, the Supreme Court of Florida restated in even stronger language its rule that a prisoner is foreclosed from raising on a second habeas corpus any point that he might have raised on a first. That was *State* v. *Mayo*, 87 So. 2d 501 (Fla. 1956), where there had been a previous direct appeal from conviction and also a state court habeas corpus and a federal court habeas corpus. The Supreme Court of Florida, reviewing the three previous proceedings, denied the writ with the comment:

> "In none of the proceedings has the question now raised been presented. Since the point now presented *has not been previously raised, despite ample opportunity to do so*, under well settled rules of decisions, we are driven to the conclusion that he has waived or forfeited the right to raise it." 87 So. 2d 501, at 503, emphasis supplied.

Although in the *Johnston* case one of the three prior proceedings involved was a direct appeal, there is no warrant for belief that the broad doctrine of that case applies only to cases involving prior direct appeals. *Durley* was itself a case which involved no direct appeal but merely successive habeas corpus proceedings. Nor does it seem to be accidental that the *Washington* v. *Mayo* language

of "raise and have determined," turned into "raise" alone in *State* v. *Mayo*. This is because the Florida rule against repetitious habeas corpus is not restricted to cases like *Durley* where the prior petition was tried out on the merits. The rule applies equally to a prior habeas corpus denied on the petition itself, as here, *Moat* v. *Mayo*, 82 So. 2d 591 (Fla. 1955).[18] We therefore submit that this Court should not, out of excess of deference to the niceties of pleading, foreclose petitioner from opportunity to dig out the trial record and whatever testimony he can find, to show that what his clumsy and secondhand newspaper quotations imprecisely say happened, did happen. Otherwise this Court, under the Florida doctrine against repetitious habeas corpus, may some day find itself in this case, as it did in *Durley*, without power to redress clear allegations of miscarriage of justice.

Conclusion

For the reasons here stated, the order of the Supreme Court of Florida denying the writ of habeas corpus should be reversed.

Respectfully submitted,

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Counsel for Petitioner

November 25, 1958

[18] By contrast, the controversial H.R. 8361, 85th Cong., seeking to approach this difficult problem of repetitious habeas corpus by limiting the lower federal court habeas corpus jurisdiction, preserves this distinction carefully. Sen. Rep. No. 2228, 85th Cong., 2d Sess., p. 33; H.R. Rep. No. 1293, 85th Cong., 2d Sess., p. 32; New York Times, August 16, 1958, p. 4.

APPENDIX

United States Constitution, Amendment XIV

§1 ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . ."

Florida Statutes cited

§90.10 (1 Florida Statutes 1957, p. 331)
Impeachment of witness by adverse party.—

"If a witness, upon cross-examination as to a former statement made by him relative to the subject matter of the cause and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it; but before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to witness, and he must be asked whether or not he made such statements."

§90.14 [L 1955, c. 29927, §1] (1 Florida Statutes 1957, p. 331)
Witnesses; pay.—

"Witnesses in all cases, civil and criminal, in the circuit courts, county courts, county judge's courts, criminal courts of record now or hereafter created, and witnesses summoned before any referee, arbitrator or master in chancery, shall receive for each day's actual attendance three[19] dollars, and also five cents per mile for actual distance traveled to and from the courts; in courts of justices of the peace, one dollar per day and the same mileage as in the circuit court."

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[19] Two dollars, in the form in effect at the time of the trial, 1 Florida Statutes 1953, p. 331.

§810.01 (2 Florida Statutes 1957, p. 2821)
Burglary; breaking and entering dwelling house, etc.—

"Whoever breaks and enters a dwelling house, or any building or structure within the curtilage of a dwelling house though not forming a part thereof, with intent to commit a felony, or after having entered with such intent breaks such dwelling house or other building or structure aforesaid, if he be armed with a dangerous weapon, or have with him any nitro-glycerine, dynamite, gunpowder or other high explosive at the time of breaking and entering, or if he arm himself with a dangerous weapon, or take into his possession any such high explosive within such building, or if he make an assault upon any person lawfully therein, shall be punished by imprisonment in the state prison for life, or for such term of years as may be determined by the court.

"If the offender be not armed, nor arm himself with a dangerous weapon as aforesaid, nor have with him nor take into his possession any high explosive as aforesaid, nor make an assault upon any person lawfully in said building, he shall be punished by imprisonment in the state prison not exceeding twenty years."

§833.01 (2 Florida Statutes 1957, p. 2860)
Conspiracy.—

"If two or more persons shall agree, conspire, combine or confederate: (1) To commit any offense; (2) falsely or maliciously to indict another for any offense, or procure another to be charged or arrested for any offense; (3) falsely or maliciously to prove or maintain any suit; (4) to cheat and defraud any person of any money or property by means which are in themselves criminal; (5) to cheat and defraud any person of any money or property by any means which, if executed, would amount to a cheat or to obtaining property by false pretenses; (6) to commit

any act injurious to the public health or public morals, or for the prevention or obstruction of justice; (7) to interfere with or prevent the holding or conducting of any election, or making returns thereof, or to prevent the due administration of the laws, they shall be punished by imprisonment not exceeding one year, or by fine not exceeding five hundred dollars."

§833.04 [L 1957 c. 57-383, §2] (2 Florida Statutes 1957, p. 2860)

Conspiracy to commit other felony.—

"If two or more persons shall agree, conspire, combine or confederate to commit any other felony they shall be guilty of a felony and punishable by imprisonment in the state prison for not more than one-fourth of the penalty or term which could have been imposed if the felony conspired to be committed had actually been committed, or by imprisonment in the state prison for one year, whichever may be the greater."

§909.21 (2 Florida Statutes 1957, p. 2938)

Appointment of counsel in capital cases.—

"In all capital cases where the defendant is insolvent, the judge shall appoint such counsel for the defendant as he shall deem necessary, and shall allow such compensation as he may deem reasonable, such sum to be paid by the county in which the crime was committed. Counsel, so appointed, may in the event of conviction and sentence of death, appeal the case to the supreme court, and prosecute said appeal to its final conclusion with diligence; and until the supreme court has disposed of the appeal, no compensation shall be allowed to such counsel. If counsel first appointed is unable for any reason to perfect and prosecute the appeal, the court may relieve him from such duty, but shall appoint other counsel for such purpose. When counsel so appointed by the court, in capital cases, completes the duties imposed by

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 91

RAY CASH,

Petitioner,

vs.

R. O. CULVER, State Prison Custodian,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

REPLY MEMORANDUM FOR THE PETITIONER, WITH APPENDIX

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

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This memorandum is filed solely as vehicle for the attached Appendix, whose relation to the case might not otherwise be apparent. The Appendix consists of that portion of the record of *Padgett* v. *State*, 53 So. 2d 106 (Fla., 1953), in which the accomplice witness Walden testified that Padgett helped him pick, case, and make getaway from the "Robbins" store, *ib.* 108.[1] We briefed *Padgett* as holding that Florida law prohibits other-crime testimony where as

[1] Copy of Appendix, certified by the Clerk of the Supreme Court of Florida, has been lodged with the Clerk of this Court.

here[2] no one except an accomplice testifies directly to the defendant's part in the crime charged (Petitioner's Brief, pp. 16-17).

Respondent, however, protests that we misread *Padgett*. He says that in *Padgett* not even the accomplice's testimony connected the defendant with the crime charged, and hence that what the Florida Court there said about other-crime testimony teaches nothing on the point of Florida accomplice law to which we cited that case (Respondent's Brief, pp. 8-10).

We present the Appendix to confirm what we thought the *Padgett* opinion made adequately clear, that the accomplice witness there, as here, did identify the defendant as participant in the crime charged.

Respectfully submitted,

IRWIN L. LANGBEIN
Counsel for Petitioner

January 9, 1959.

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[2] The petition at bar alleges, "• • • there was nothing that would connect Allen [the accomplice here] and the petitioner except Allen's word" (R. 4; Petitioner's Brief, p. 18).

APPENDIX

IN THE SUPREME COURT OF THE STATE OF FLORIDA

O. B. PADGETT, Appellant,

—v.—

STATE OF FLORIDA, Appellee.

Partial Transcript From Record on Appeal

I, Guyte P. McCord, Clerk of the Supreme Court of Florida, hereby certify that the following is a true copy of a portion of the original Record-on-Appeal in *O. B. Padgett* v. *State of Florida,* No. 21,366, decided by the Supreme Court of Florida June 12, 1951, reported 53 So. 2d 106, being an extract from the court reporter's minutes of the trial with marginal page references of that Record-on-Appeal:

IN THE CIRCUIT COURT OF THE SECOND JUDICIAL CIRCUIT IN AND FOR LEON COUNTY, FLORIDA

STATE OF FLORIDA, —vs.— O. B. PADGETT,	Breaking and Entering and Accessory Before the Fact

Trial held November 4th and 5th, 1949 in the Leon County Court House, Tallahassee, Florida before Honorable Hugh Taylor, Judge of said Court.

Appearances:

For the State: W. D. Hopkins, Esquire, State Attorney, Henry Morrison, Esquire, Assistant State Attorney.

For the Defendant: Orion Parker, Esquire, of Parker & Parker, Tallahassee, Florida, Clyde Atkinson, Esquire, of Atkinson & Atkinson, Tallahassee, Florida.

[fol. 31] DAVE WALDEN, Witness for the State, being duly sworn, testified as follows:

Direct examination.

By Mr. Hopkins:

Q. Please state your name?
A. Dave Walden.

* * * * * * *

Q. Do you know the defendant, O. B. Padgett, sitting over here?
A. Yes, sir.

* * * * * * *

[fol. 33] Now, did you plan specifically to rob Sam Robbins' store here in Tallahassee?
A. Yes, sir.
Q. Tell the jury, if you will, what plans were made and what groundwork you laid for that robbery.
A. Well, I just worked out the plans on it and went ahead and robbed it on a Sunday night.
Q. Who pointed out Sam Robbins' store to you?
A. Well, I was with Mr. Padgett whenever I looked it over and he showed me where it was.
Q. Did you go into the store at any time, Sam Robbins' store?
A. Yes, sir.
Q. What did you go in there and ask for?
A. The first time I went there, I went there and bought a coat and a hat.
Q. Were you satisfied with the case on that particular trip there?
A. I was satisfied with the inside but I come back later at night and looked it over.
Q. Went back later and looked it over again?
A. Yes, sir.
Q. When you sent back later and look the job over, what [fol. 34] was the occasion for going in there, or what did you ask for?

A. Well, the next time I went back I wanted to go upstairs so I could look the top of the building over and that's the only two times I went there in the daytime.

Q. What did you ask for, if you remember, so you could specifically get a look at the safe?

A. Well, buying these clothes I just maneuvered around the building in order to get a look at this safe. That's all I cared about seeing, outside the entrance and top; I didn't get to get up there the first time. I had to come back the second time.

Q. Did Mr. Padgett go there to the store with you on any other occasion other than the first time he carried you there?

A. Well, he didn't go in the first time. He did the second time. He went in with me too—so he could entertain the merchant so I would be free to look all around and go upstairs.

Q. Did you plan to rob it on a Saturday night before you actually did rob it?

A. Yes, sir.

Q. What went wrong that night and what night was it?

A. It was on a Saturday night and it happened that Mr. Padgett let the merchant there see him and got in a conversation with him so I thought it best to put it off after that.

Q. Why was Mr. Padgett to go by the store, Mr. Walden? Why was he to be near the store?

A. In order to watch for me.

Q. What kind of watching was he doing on that night, that Saturday night when you went up there?

[fol. 35] A. Well, to begin with, we went there early in order to see if he, when he closed up, if he carried the money to the bank or whether he took it home with him or not. He didn't do either one so we assumed he left it in the safe.

Q. Did you and Mr. Padgett follow Mr. Robbins far enough to see that he did not go by the bank?

A. Yes, sir.

Q. Did you have an automobile down here of your own?

A. No, sir.

Q. Whose car was it you followed Mr. Sam Robbins in that night?

A. In Mr. Padgett's car.

Q. Now, what did Mr. Padgett come out of Sam Robbins' store with on the night that you planned to rob it at first and thought you had better not because Padgett would be recognized as the last person in the store?

Mr. Atkinson: We object to that as a leading question.

The Court: Objection sustained.

Mr. Hopkins:

Q. What did Mr. Padgett do on this particular night that you say you went there first, had first planned to rob it on Saturday night?

A. Well, in the conversation he was going in the store and buy a jack from the lady in the store. I think it might have [fol. 36] been Mr. Robbins' wife.

Q. Is that the reason you put off robbing it that Saturday night?

A. Yes, sir.

Q. Now, when did you rob it? What night, day of the week, if you know, about what time?

A. It was on a Sunday night, I don't remember the date but it was around 10:00 o'clock, I reckon, I went in.

Q. Who selected the time of night to go in?

A. Well, it was Mr. Padgett's idea about that cause he was familiar with the town and the way the officers work here when they change shifts and one thing and another.

Q. Did he tell you they changed shifts about that time of night?

A. Yes, sir.

Q. Now, when you did rob it on Sunday night, who brought you down to Sam Robbins' place to make the robbery?

A. Mr. Padgett.

Q. What did he do while you were going in the place? Or what was his plan? I'll put it that way.

A. The plan was for him to stand out in front and watch for me temporarily while I went up the stairway and then after that he was to ride around, you know. See, I didn't want him to be seen there on the street.

Q. Now, how did you enter the building? How did you go about getting into Sam Robbins' place?

A. From the roof.

Q. How did you get up to the roof?

A. I went up the stairway three or four doors from the store; and the stairway is a stairway to an insurance office there and I went through a window out an adjoining building on the roof and walked down to where his store was.

[fol. 37] Q. And how did you get in the store from the roof?

A. I sawed a bar out of the window that put me in the second story, the storeroom in the back of the store.

Q. Then after you went in, what did you do?

A. Went down the stairway on the lower floor and robbed the safe and come back out.

Q. Any trouble to break it open?

A. No, sir.

Q. Have any tools?

A. Yes, sir.

Q. Where did you get the tools from?

A. I got them up around Padgett's premises.

Q. Where on Padgett's premises?

A. In his garage.

Q. Does he have a tool shed there?

A. Well, yes, sir, there's a tool shed; I say the garage. It was right beside the house, might be called a garage.

Q. All right, now, after you had robbed this safe, what did you do then? After you finished opening the safe and taking the contents out of Sam Robbins' store, what did you do?

A. I came back to where I came in on the roof and back down the stairway. The car was parked out in front of the stairway and I walked from there over to the car and got in.

Q. Who was in the car, if anybody?

A. Well, Padgett wasn't in it then. He was inside of one of the stores there down the street and I had to wait for him.

Q. Who was to give you the signal, if anybody, when you were to come out of the stairway?

[fol. 38] A. Padgett was supposed to give me the signal when to come out but he wasn't there.

Q. All right, now, after you robbed this safe and you and Mr. Padgett got back in the car, where did you go? What did you do?

A. Went out to his house and put the money there in his house.

Q. Where did you put the money in the house?

A. In his living quarters.

* * * * * * *

Clerk's Certificate to foregoing transcript omitted in printing.

SUPREME COURT, U. S.

DEC 22 1958

JAMES R. BROWNING, Clerk

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958

No. 91

RAY CASH,

PETITIONER,

v.

R. O. CULVER, State Prison Custodian,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR RESPONDENT

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Tallahassee, Florida

INDEX AND TABLE OF CASES

Subject Index

	Page
Questions Presented	1-2
Statement of the Case	2
Summary of Argument	3-4
Argument	4-17
ONE. The petition for writ of habeas corpus filed in the Supreme Court of Florida does not establish that petitioner was deprived of a fair trial because of the trial court's failure to appoint counsel in his behalf.	4-11
TWO. The petition for writ of habeas corpus filed in the Supreme Court of Florida reflects that the trial judge did not deprive petitioner of a fair trial by denying his motion for continuance seeking additional time to procure counsel of his choice.	12-15
THREE. The newspaper accounts of petitioner's trial do not reflect that petitioner was deprived of a fair trial within the contemplation of the Fourteenth Amendment to the Constitution of the United States and the decisions of this court.	15-17
Conclusion	17
Proof of Service	18

Cases

Acree v. State, 153 Fla. 561, 15 So. 2d 262	12, 14
Bacon v. State, 22 Fla. 52	8
Betts v. Brady, 316 U. S. 455	4, 5, 11
Bronson v. State, 117 Fla. 828, 158 So. 435	8
Brunke v. State, 160 Fla. 43, 33 So. 2d 226	12

	Page
Carter v. Illinois, 329 U. S. 173	5, 12
Foster v. Illinois, 332 U. S. 134, 136-137	10
Hatcher v. State, 74 Fla. 112, 76 So. 694	9
Johnson v. Mayo, 158 Fla. 264, 28 So. 2d 585	4
Land v. State (Fla.), 59 So. 2d 370	9
London v. State (Fla.), 48 So. 2d 926	12
Nickels v. State, 90 Fla. 659, 106 So. 479, 488	8
Padgett v. State (Fla.), 53 So. 2d 106	8, 9, 10
Palko v. Connecticut, 302 U. S. 319	4
Powell v. Alabama, 287 U. S. 45	4, 5
Sneed v. Mayo (Fla.), 66 So. 2d 865	4
State ex rel. Davis v. Hardie, 108 Fla. 133, 146 So. 97	12, 13
Talley v. State, 160 Fla. 593, 36 So. 2d 201	8
Wade v. Mayo, 334 U. S. 672	5
Wadsworth v. State, 136 Fla. 134, 186 So. 435	12
Wallace v. State, 41 Fla. 547, 26 So. 713	8
Wilson v. State, 134 Fla. 199, 183 So. 748	8

STATUTES AND CONSTITUTIONAL PROVISIONS

Florida Statutes:	
Section 909.21	4
Chapter 916	12
Section 916.01	14
U. S. Constitution:	
Fourteenth Amendment	2, 4, 5, 6, 10, 11, 13

IN THE SUPREME COURT OF THE UNITED STATES

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RAY CASH,
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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

We state as follows the three questions presented:

QUESTION ONE

WHETHER OR NOT PETITIONER WAS DENIED DUE PROCESS OF LAW BY NOT HAVING COUNSEL APPOINTED FOR HIM IN A NON-CAPITAL CASE?

QUESTION TWO

WHERE PETITIONER FAILS TO SHOW THAT THE DENIAL OF HIS MOTION FOR CONTINUANCE RE-

QUESTING ADDITIONAL TIME TO ENGAGE COUNSEL CONSTITUTED AN ABUSE OF DISCRETION, IS THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES VIOLATED SO AS TO ENTITLE THE PETITIONER TO A WRIT OF HABEAS CORPUS?

QUESTION THREE

ARE IMPRESSIONS OF NEWSPAPER REPORTERS CONCERNING THE EVENTS THAT TRANSPIRED AT PETITIONER'S RETRIAL PROPER FOR CONSIDERATION AS ALLEGATIONS IN SUPPORT OF PETITIONER'S CLAIM OF AN UNLAWFUL IMPRISONMENT?

STATEMENT OF THE CASE

In 1957, petitioner filed his petition for writ of habeas corpus in the Supreme Court of Florida (R. 1-19), the denial of which is now under review. In said petition, it is alleged that petitioner's present incarceration is in violation of the Fourteenth Amendment to the Constitution of the United States of America (R. 1).

On December 10, 1957, said petition was denied without opinion. The order of denial recited that: "The above named petitioner has filed a petition for Writ of Habeas Corpus, and upon consideration thereof, it is ordered that said petition be and the same is hereby denied" (R. 20).

On June 9, 1958, this Court entered its order granting petitioner's motion for leave to proceed *in forma pauperis;* and granted petitioner's petition for writ of certiorari, seeking a review of the above order of the Supreme Court of Florida (R. 21).

SUMMARY OF ARGUMENT

ONE

The petition for writ of habeas corpus filed in the Supreme Court of Florida reflects that petitioner was possessed of sufficient intelligence to adequately defend himself against a charge of breaking and entering with the intent to commit a felony. Said petition reflects that petitioner had adequate knowledge of trial procedures and was, in fact, subjected to a previous trial in a criminal court on the same issues involved in the instant case.

TWO

Petitioner has failed to show that the trial court's denial of his motion for continuance constituted an abuse of judicial discretion so as to constitute a deprivation of due process of law. His petition for writ of habeas corpus reflects that efforts were made to secure counsel for petitioner. Petitioner's mother spoke to a number of lawyers but was unable to persuade anyone to represent her son in the trial of this cause. Petitioner does not allege nor does his petition for writ of habeas corpus reflect that any further efforts to secure counsel would have met with success.

It is pointed out that although the petitioner did not personally attempt to engage counsel, such attempts were made on his behalf by his mother.

In light of the Florida rule that motions for continuance in a criminal case must be subjected to careful scrutiny because of the temptation to delay, the trial court was more than justified in denying petitioner's motion for continuance.

THREE

Recognizing that the petition for writ of habeas corpus

involved herein should not be subjected to rigid rules of pleading required in other proceedings, we do not take issue with petitioner's position relative to the newspaper accounts of his trial as set forth in his petition for writ of habeas corpus. However, said newspaper accounts do not reflect that petitioner was deprived of a fair trial. These quotations from a local periodical indicate that efforts were made to secure counsel to represent petitioner; that he had knowledge of trial procedures used in a criminal court and was able to protect his interests in the trial below.

ARGUMENT

ONE

PETITIONER WAS NOT ENTITLED TO HAVE COUNSEL APPOINTED TO REPRESENT HIM IN A NON-CAPITAL PROSECUTION AS A MATTER OF RIGHT UNDER AMENDMENT FOURTEEN OF THE CONSTITUTION OF THE UNITED STATES IN THAT THE LAW OF FLORIDA DOES NOT REQUIRE SUCH APPOINTMENT IN NON-CAPITAL CASES WHERE NO INCAPACITY IS SHOWN TO HAVE EXISTED REQUIRING APPOINTMENT OF COUNSEL.

Petitioner's contention is truly without merit in that there existed no incapacity on his part to vitiate the proceedings in which he represented himself without counsel. Having failed to establish any such incapacity and since there is no absolute duty under Florida law that counsel be furnished a defendant, except when the defendant is insolvent and is subjected to a prosecution for a capital offense, petitioner's position must fail as a matter of law (*Betts v. Brady*, 316 U. S. 455; *Powell v. Alabama*, 287 U. S. 45; *Palko v. Connecticut*, 302 U. S. 319; *Sneed v. Mayo* (Fla.), 66 So. 2d 865; *Johnson v. Mayo*, 158 Fla. 264, 28 So. 2d 585; *Section 909.21, Florida Statutes*).

Moreover, this Court is committed to the proposition under a long array of precedent as precisely expressed in the relatively recent decision of *Carter v. Illinois*, 329 U. S. 173, to the effect that each state has the right to establish its own rules of criminal procedure, provided they do not deny fundamental guarantees of due process. When such is analyzed in light of this Court's holding in *Wade v. Mayo*, 334 U. S. 672, we respectfully submit that no violation of petitioner's rights exists.

Such duty as may rest on the Florida courts to furnish counsel in criminal cases less than capital arises by virtue of the Fourteenth Amendment to the Constitution of the United States, and it imposes no absolute requirement that counsel be furnished, unless the accused is incapable of representing himself adequately at trial on account of age, ignorance or lack of mental capacity *(Powell v. Alabama*, supra.)

It is only where lack of counsel would deprive a defendant of a fair trial is there created a duty to appoint counsel to represent such a defendant *(Betts v. Brady*, 316 U. S. 455).

Petitioner asserts before this Court that in view of his age, established as being 20 years at the time of his trial, and the fact that he is uneducated, he was not able to adequately defend himself during the trial below (R. 3, 11, 13). He attempts to establish in his brief that the issues involved in his trial were of such a complex nature that he should not have been expected to be capable of defending without aid of counsel.

It is respectfully submitted that an examination of the petition for writ of habeas corpus filed in the Supreme Court of Florida reduces petitioner's contention to a nullity.

The showing made on the face of that instrument rebuts any allegation that petitioner was an inexperienced youth, incapable of adequately representing himself. It is revealed that this petitioner was sufficiently astute to request a continuance in an attempt to delay his trial and make some further effort to obtain counsel to represent him (R. 2). His colloquy with the trial judge concerning the circumstances surrounding the withdrawal of his attorney manifests some knowledge of criminal procedures as used in criminal trials (R. 2). Moreover, it is revealed most clearly that petitioner could not be totally unfamiliar with criminal procedure as he asserts, inasmuch as he was previously subjected to a criminal trial involving the same issues presented in the cause of which he now complains (R. 3).

Moreover, even if petitioner had no previous trial experience, such cannot be deemed an element fatal to his conviction. It in no way rebuts the presumption of the validity of his trial and clearly does not indicate any element of *extreme youth, ignorance* or *mental incapacity* on his part which might be construed as evidence of his inability to adequately defend himself.

Petitioner recites in his petition that certain incidents occurring during his trial were reported in a local newspaper (R. 3, 12, 14-15). He relies on the personal observations made by the author of these articles to establish that he was unable to adequately defend himself. It is submitted that, even if true, these personal observations by an observer at the proceedings had in the trial court, phrased in such a manner so as to attract the eye of the reading public, can form no basis for petitioner's contention in terms of any denial of due process of law under the Fourteenth Amendment.

These statements, even if true, furnish a reasonable basis to infer that petitioner did know when to object, was not deprived of an opportunity to do so, and could adequately

represent himself during his trial, although admittedly not in a professional manner. However, the inability to represent oneself as capably as an attorney does not establish a valid infirmity rendering petitioner's conviction void. To hold otherwise would require the appointment of counsel in all cases, capital or non-capital, arising in Florida courts, such being contrary to the law of Florida and the decisions of this Court.

In an effort to establish that the instant prosecution was of such a complex nature that petitioner could not adequately defend himself, petitioner points to the existence of several defensive tools or procedures that Florida law makes available to any defendant. It is petitioner's contention that without counsel, he could not avail himself of these trial implements.

Petitioner first points to the fact that the instant prosecution was based on accomplice testimony. He asserts that Florida law requires that a jury be advised of the suspect quality of accomplice testimony, and that petitioner could not have known of such a rule.

There is nothing in the record to indicate that the trial court did not charge the jury as required by Florida law. In light of petitioner's failure to so contend before the Supreme Court of Florida, it must be presumed that the trial court performed its duty and properly charged the jury as to the law of the case. Petitioner did not allege in the Florida Court that he was unaware of such a rule, or that such an instruction was not given.

Moreover, petitioner did not allege before the Supreme Court of Florida that he was prevented from cross-examining his accomplice, and again, it must be presumed that he was permitted to make such a cross-examination.

It must be remembered that this cause was before the Supreme Court of Florida on a petition for writ of habeas

corpus. In such proceedings, in the absence of an allegation to the contrary, it must be presumed that the trial court performed its duty and the trial was conducted in a proper manner. The conclusions arrived at by petitioner in his brief are not sufficient to overcome the fact that such allegations were not made before the Supreme Court of Florida. This Court should not read into the petition allegations that are not set forth therein. The ruling of the Supreme Court of Florida should not be weighed upon the basis of a matter which was not before that Court for consideration.

Petitioner next points to the admission of testimony concerning his participation in crimes other than the crime involved in the instant prosecution. It has long been the law in Florida that testimony relating to other crimes is admissible for the purpose of identifying the defendant; or proving the plan, intent or knowledge of the defendant; or to show that the acts charged against him were not the result of accident, mistake, or inadvertence (*Nickels v. State,* 90 Fla. 659, 106 So. 479, 488; *Wallace v. State,* 41 Fla. 547, 26 So. 713; *Bronson v. State,* 117 Fla. 828, 158 So. 435; *Wilson v. State,* 134 Fla. 199, 183 So. 748; *Talley v. State,* 160 Fla. 593, 36 So. 2d 201).

It is petitioner's contention that the above rule is conditioned to the effect that testimony of other crimes is admissible in a prosecution based on accomplice testimony *only* where there is evidence *other* than that of the accomplice to connect the accused to the principle crime charged. In support of his position, he cites to this Court the case of *Padgett v. State* (Fla.), 53 So. 2d 106. An examination of the *Padgett case,* supra, reflects most clearly that petitioner has misconstrued the reasoning set forth by the Supreme Court of Florida in that case. The rule in Florida is clear. Accomplice testimony need not be corroborated in order to sustain a conviction (*Bacon v. State,* 22 Fla. 52;

Hatcher v. State, 74 Fla. 112, 76 So. 694; *Land v. State* (Fla.), 59 So. 2d 370). The decision of the Supreme Court of Florida in *Padgett v. State*, supra, does not constitute an exception to that rule. In the *Padgett case*, supra, the Florida Court simply recognized that before evidence of other crimes could be admitted in evidence, there must be some evidence connecting an accused with the principle crime charged. The Supreme Court of Florida simply concluded in the *Padgett case*, supra, that no such connection existed. A careful reading of the decision in that case reflects that the Supreme Court of Florida's order of reversal was based on the fact that neither the testimony of the defendant's accomplice nor other witnesses connected the defendant with the charged crime.

The Supreme Court of Florida concluded that had there been *any* evidence to connect the defendant with the principle crime, testimony regarding other burglaries might have been admissible. The decision in *Padgett v. State*, supra, reflects that there was no testimony, accomplice or otherwise, to connect the defendant with the principle crime. The Florida Court did not adopt a rule that would exclude testimony of other crimes simply because the evidence connecting a defendant with the principle crime came from an accomplice witness. This is manifested by the language adopted by the Supreme Court of Florida in *Padgett v. State*, supra, at Page 108:

> "(2) In the instant case there is not an iota of testimony except Walden's (accomplice witness) to connect the defendant with the crime for which he is charged. Walden claimed that the defendant had helped him to select the places to be burglarized, had gone with him in advance of the burglaries to each of the locations to look over the lay of the land, and had been his get-away man in each instance. *Had there been any evidence of defendant's doing any of these three acts in the Robbins case* (the principle crime charged) *testi-*

mony regarding the other two burglaries might have been admissible to show his intention in the Robbins case, see State v. Valwell, 66 Vt. 558, 29 A. 1018, but there was no such evidence.'' (Parenthetical matters and Emphasis supplied)

Petitioner did not allege that the accomplice testimony was not sufficient to connect petitioner with the instant crime, thus, it must be presumed that Allen's testimony sufficiently connected petitioner to the crime charged herein. Therefore, evidence concerning petitioner's participation in other crimes of similar nature was admissible to establish plan, motive or intent to commit the principle crime (*Padgett v. State*, supra, and cases cited therein).

Moreover, petitioner alleged before the Supreme Court of Florida that Allen's testimony *was* corroborated (R. 12). Thus, Allen's testimony did not stand alone. The prosecutor did call witnesses to corroborate Allen's account of the crime (R. 12).

Petitioner's plea that this Court construe the Due Process Clause of the Fourteenth Amendment so as to require the appointment of counsel in all cases involving a retrial after a hung jury is contrary to this Court's decisions in numerous cases. In *Foster v. Illinois*, 332 U. S. 134, 136-137, this Court stated:

> ''''*Prosecutions in State courts are not subject to this fixed requirement. So we have held upon fullest consideration. Betts v. Brady*, 316 US 455, 86 L ed 1595, 62 S Ct 1252, supra. But process of law in order to be 'due' does require that a State give a defendant ample opportunity to meet an accusation. And so, in the circumstances of a '*particular situation*,' assignment of counsel may be 'essential to the substance of a hearing' as part of the due process which the Fourteenth Amendment exacts from a State which imposes sentence. Palko v. Connecticut, supra (302 US at 327, 82 L ed 293, 58 S Ct 149.)''''(Emphasis supplied)

The necessity for court-appointed counsel for an indigent defendant must be determined after an examination of the circumstances surrounding each individual case. The Fourteenth Amendment does not establish a fast rule to be applied in every case.

When the petition for writ of habeas corpus as presented to the Supreme Court of Florida is examined, it is revealed that petitioner failed to establish that under Florida law he had a right to appointed counsel. When his contradictory allegations are reconciled, it is revealed that he rebuts any contention that he was not able to adequately defend himself in the trial below. The cause being before the Florida Court on a petition for writ of habeas corpus, it was incumbent upon the petitioner to establish that a writ of habeas corpus should issue. The instrument filed in the Supreme Court of Florida fails to make such a showing.

Petitioner's argument reflects no more save a lack of legal training. If such argument be accepted, it would be contrary to the well-reasoned opinions of this Court. Petitioner's reasoning would require the appointment of counsel by state courts in all criminal cases where the defendant is not trained in the law. Such is not the law in Florida and not the rule set forth by this Court. In *Betts v. Brady*, 316 U. S. 455, this Court stated at Page 473:

> "As we have said, the Fourteenth Amendment prohibits the conviction and incarceration of one whose trial is offensive to the common and fundamental ideas of fairness and right, and while want of counsel in a particular case may result in a conviction lacking in such fundamental fairness, *we cannot say that the amendment embodies an inexorable command that no trial for any offense, or in any court,* can be fairly conducted and justice accorded a defendant who is not represented by counsel." (Emphasis supplied)

TWO

THE TRIAL COURT'S DENIAL OF PETITIONER'S MOTION FOR CONTINUANCE DID NOT CONSTITUTE A DENIAL OF DUE PROCESS OF LAW.

This Court is committed to the rule that each state has the right to establish its own rules of criminal procedure, provided they do not deny fundamental guarantees of due process *(Carter v. Illinois,* 329 U. S. 173).

Chapter 916, Florida Statutes, prescribes the procedures controlling a motion for continuance, and establishes most clearly that the granting or denial of a motion for continuance is a matter vested in the sound discretion of the trial court *(Acree v. State,* 153 Fla. 561, 15 So. 2d 262; *Brunke v. State,* 160 Fla. 43, 33 So. 2d 226; *London v. State* (Fla.), 48 So. 2d 926). According to the law of Florida, the determination of whether a trial judge erred in refusing to grant a continuance must be based on the facts of the particular case and an abuse of discretion must be clearly shown *(Wadsworth v. State,* 136 Fla. 134, 186 So. 435).

In light of this clearly established rule, it was incumbent upon the petitioner to show in the Supreme Court of Florida that the actions of the trial court were an abuse of judicial discretion resulting in a denial of due process of law.

It is respectfully submitted that the showing made by petitioner's application for writ of habeas corpus clearly rebuts the assertion that petitioner's detention is in any manner unlawful and thus the Supreme Court of Florida was justified in denying his petition for writ of habeas corpus. In *State ex rel. Davis v. Hardie,* 108 Fla. 133, 146

So. 97, the Supreme Court of Florida set forth the rule to be followed in Florida:

> "(4) While habeas corpus may issue on a very informal application (Pounds v. Darling, 75 Fla. 125, 77 So. 666, L. R. A. 1918E, 949; Ex parte Pells, 28 Fla. 67, 9 So. 833), the writ itself should not be allowed where the petition for habeas corpus shows on its face facts conclusively rebutting the petitioner's assertion that his imprisonment is unlawful. Hanley v. State, 50 Fla. 82, 39 So. 149."

Petitioner, while represented by counsel, was placed on trial for breaking and entering with the intent to commit a felony, said trial resulting in a mistrial because of the jury's inability to arrive at a verdict (R. 2). While confined in the Florida State Prison awaiting retrial, petitioner was informed that his attorney intended to withdraw from the case and did subsequently withdraw (R. 2). On the day of his second trial, petitioner requested a continuance in order that he could secure another attorney to represent him (R. 2). Petitioner contends in his application for writ of habeas corpus that because of his close confinement in the Florida State Prison and the withdrawal of his counsel, the trial court's denial of his motion for a continuance constituted a deprivation of his right to due process of law under the Fourteenth Amendment to the Constitution of the United States (R. 3).

When the factual averments contained in the petition for writ of habeas corpus are examined, it is revealed that one week prior to the date of his second trial, petitioner was made aware of his attorney's intention to withdraw (R. 2), and that four days prior to said retrial, he was informed of his attorney's actual withdrawal (R. 2). Nowhere in his petition does he allege that he indicated to the officials at the Florida State Prison that he desired to *personally* communicate with an attorney, or that any such request was refused.

His petition reveals further that during the week preceding petitioner's second trial, his mother was aware of petitioner's loss of counsel and did make efforts to secure another attorney to defend her son (R. 3-4). It is revealed that her efforts to secure such legal counsel were futile and a reading of the petition for writ of habeas corpus fails to reflect that even if afforded an additional reasonable period of time would her efforts prove to be successful. Thus, in the face of these facts and the trial court's proper determination that petitioner was capable of representing himself, and recognizing that both the state and a defendant have a right to a speedy trial, the trial judge properly refused to delay the proceedings any further *(Section 916.01, Florida Statutes)*. Moreover, it is clearly the rule in Florida that motions for a continuance in criminal cases are to be more closely scrutinized than in civil cases because of the greater temptation to delay *(Açree v. State*, supra).

Petitioner has failed to show that any further efforts to secure counsel would prove successful. He does not show that he or his mother had sufficient funds to employ an attorney, or that they had a particular attorney under consideration, and as such, a reasonable delay in the trial could result in his employment. In fact, as shown above, it is clearly revealed that any further efforts to secure counsel would have been futile and the granting of petitioner's motion for continuance would constitute an unwarranted delay of the trial.

The petitioner's allegation that his motion was denied only because the State had gone to great expense to marshall its witnesses is refuted by the record.

Petitioner has completely overlooked the fact that his mother had made attempts to secure an attorney on his behalf, and in light of his confinement would be the logical person to so endeavor (R. 3). The fact that petitioner could

not personally inquire of an attorney's desire to represent him cannot destroy the fact that reasonable time was allowed his mother in her efforts to secure an attorney. It must be presumed that the trial judge took into consideration all the circumstances surrounding counsel's withdrawal, petitioner's confinement, the efforts already made to secure another attorney, and the nature of the offense, in determining whether the trial should be further delayed. It must be presumed that his final determination was a proper exercise of judicial discretion in face of petitioner's failure to show otherwise.

If petitioner's reasoning were adopted, any person who was held in custody awaiting trial could delay his trial by the simple expedient of requesting a continuance in order to secure counsel, even though other persons had made efforts to secure counsel on his behalf.

In conclusion as to this point, respondent submits that the denial of petitioner's application for writ of habeas corpus was most proper. Petitioner's petition fails to show any such abuse of the trial court's discretion that would warrant the issuance of a writ of habeas corpus. Moreover, his application for writ of habeas corpus reveals on its face that no such abuse of discretion exists.

THREE

UNDER THE LIBERAL RULE ADOPTED IN RELATION TO THE FORM OF PLEADINGS IN A HABEAS CORPUS PROCEEDING, PETITIONER'S ADOPTION OF NEWSPAPER ACCOUNTS RELATING TO WHAT TRANSPIRED AT HIS TRIAL COULD BE CONSIDERED DIRECT ALLEGATIONS OF THE PETITIONER HIMSELF.

Respondent does not contend that the newspaper accounts of petitioner's trial should be disregarded by this Court in

determining if his petition for writ of habeas corpus presented sufficient grounds to warrant the issuance of a writ of habeas corpus.

However, we submit that said newspaper accounts reflect simply that the petitioner's incapacity to defend himself was limited solely to an inability to do same with the same degree of skill that would be expected from an experienced member of the bar.

Petitioner's references to the local press indicate that petitioner was aware that he had a right to object to the introduction of any evidentiary matter he thought was subject to objection and that he did voice such objections, although admittedly not in a professional manner (R. 14-15).

These newspaper accounts reflect further that a week prior to the date of his retrial, petitioner was aware of his counsel's intention to withdraw. Moreover, they reflect that his mother did make a diligent search in an attempt to secure another attorney (R. 2-3). It is pointed out that neither petitioner's allegations nor his adopted allegations reflect that a further delay of his trial would enable his mother to secure counsel to represent him in his pending trial (R. 2-3).

In conclusion to this point, we respectfully submit that even if the newspaper accounts of petitioner's trial are considered as part of the record herein, petitioner has failed to establish anything save his inability to defend himself with the same degree of proficiency an appointed or chosen counsel may have utilized. Petitioner has failed, however, to establish that he was not capable of protecting his interests. It is pointed out that even amongst members of the bar, degree of ability will vary. A petitioner not satisfied with his chosen or court-appointed counsel could not complain that another counsel could have handled his case in a

better manner. The fact that petitioner is not trained in the law does not constitute sufficient grounds to require that a trial court in the State of Florida, appoint counsel to represent an indigent defendant in a non-capital prosecution. Moreover, such a situation does not require a trial court to grant a motion for continuance in order to procure counsel where the record shows that efforts were made to obtain counsel for the defendant and that such efforts were to no avail. The record fails to reflect that the granting of additional time to search the roster of the Florida Bar in an effort to persuade some attorney to take the case, would uncover an attorney willing to defend petitioner in the trial below.

CONCLUSION

The judgment of the Supreme Court of Florida should be affirmed.

Respectfully submitted,

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Assistant Attorney General
COUNSEL FOR RESPONDENT

PROOF OF SERVICE

I, Richard W. Ervin, Attorney General of Florida, certify that on the 19th day of December, 1958, I served copies of the foregoing Brief for Respondent upon petitioner by mailing the same air mail with postage prepaid to petitioner's counsel, the Honorable Irwin L. Langbein, addressed to him at his post office address viz; 205 Datura Street, West Palm Beach, Florida.

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RICHARD W. ERVIN
Attorney General of Florida